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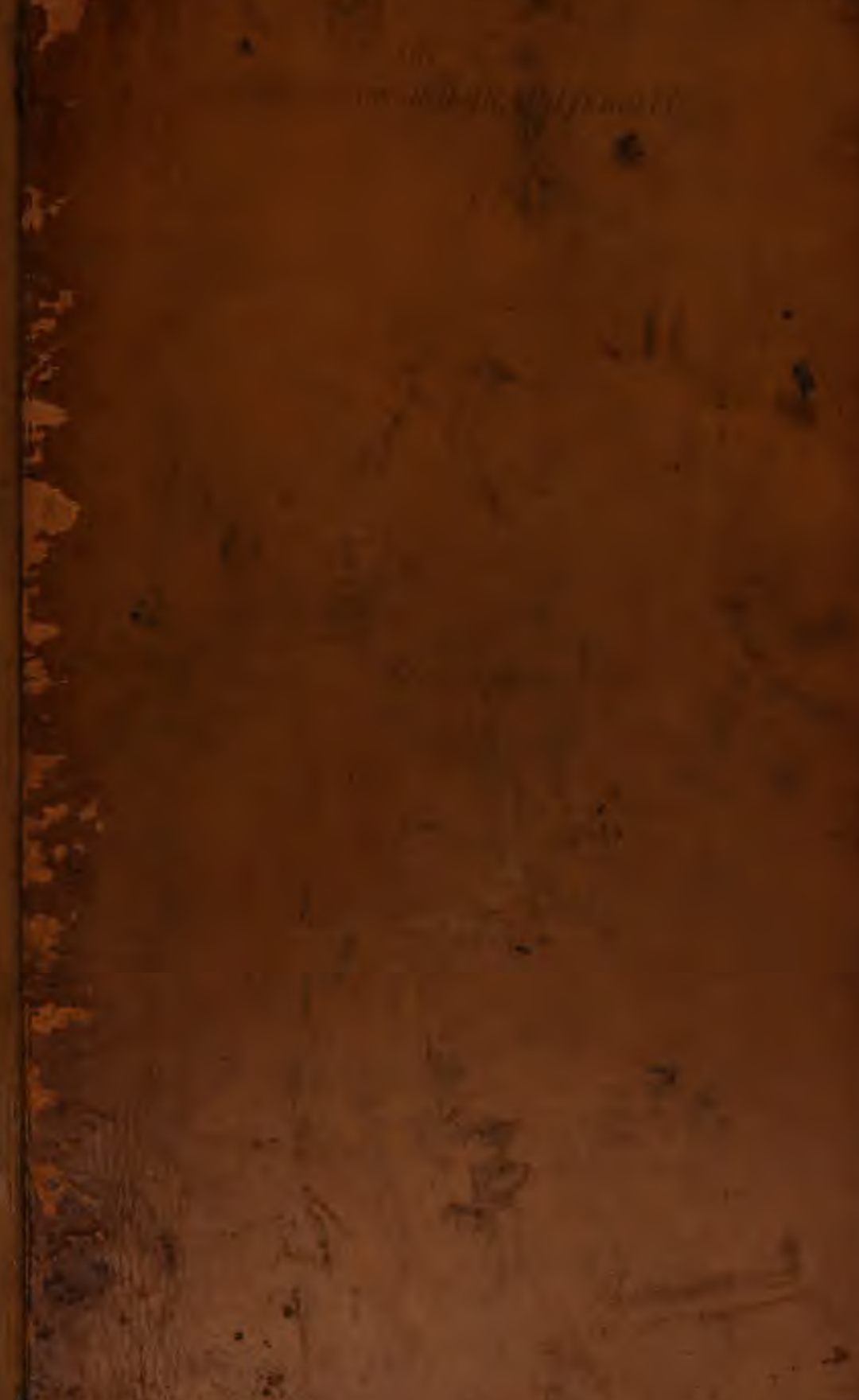
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REPORTS OF CASES
Ad. B. 1. DECIDED IN THE
HIGH COURT OF CHANCERY,
IN 1852 AND 1853,

BY
SIR RICHARD TORIN KINDERSLEY,
VICE-CHANCELLOR.

BY
CHARLES STEWART DREWRY, ESQ.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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1853.

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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR

SIR R. T. KINDERSLEY.

STANDISH *v.* MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF LIVERPOOL
and certain other Persons Tenants of Plaintiff's Land.

1852:
March 11.

Injunction.
Laches.

Lands Clauses
Consolidation
Act.

THIS was a motion for an injunction to restrain the Defendants, the Mayor, Aldermen, &c., their contractors and agents, from continuing in possession of any part of the lands comprised in the notice, schedule, and plan, served by those Defendants on the Plaintiff, on the 23rd

A corporation having, under an Act of Parliament, right to take land for the

purpose of certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons, and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the Plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the Defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c. to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses Consolidation Act. Held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the Act, and the bill was improperly filed.

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day of December, 1851, and from allowing the earth, waggons, iron rails, and tram plates placed there by the Defendants, to remain there, and from entering upon or into possession of any part of the lands comprised in the said notice, plan, and schedule, unless and until they should first have complied with the Lands Clauses Consolidation Act 1845, and from in any manner contravening the provisions thereof.

The bill was filed on the 9th of February.

The Plaintiff was seised in fee of land in the neighbourhood of *Liverpool*, subject to the rights of certain tenants in possession, viz. *I. Winstanley, E. Morris*, and others. By the affidavit of *W. L. Smart*, the solicitor of the Plaintiff, it appeared that the Defendants had given notice to take the Plaintiff's land. The Defendants had entered on part of the land for the purpose of constructing their works, viz. The *Liverpool* Water Works; but they had not paid the money. Early in January, 1852, the contractors employed by the Defendants had brought earth waggons, iron rails, and tram plates on the land, without the permission of the owner, but with the permission of the tenants. They had brought earth waggons, and fifteen tons of iron rails, and the wheels of the waggons had flanges, which, it was sworn, had cut up the surface of the land.

The affidavits of *Hawkesley*, the Defendants' engineer, and of *Okes*, assistant engineer, on the part of the Defendants, were to the following effect:—That on the 10th of February no acts had been done by which the surface of the land was dug up or cut up, otherwise than as stated in the bill; and that what had been done was done with the consent of the tenants in possession;

that the Defendants, the Corporation, had not given any authority to the contractors or their agents to enter on the land.—*Statham*, another witness for the Defendants, proved that the contractors employed by the Defendants could not, by the terms of the contract, proceed with their works until the Defendants should have given them possession of such parts of the land as should be declared by the engineer of the Corporation to be requisite; and that no such declaration had been yet made by the engineer, and that the waggons, &c. were only placed on the land for a temporary purpose. *Lawton*, one of the contractors, by an affidavit sworn on the 9th and filed on the 10th of February, proved that he entered into a contract with the Defendants for the construction of reservoirs, &c., portions of the intended works to be constructed on the land belonging to the Plaintiff. He proved that the consent of *Morris*, one of the tenants, had been obtained through his agent, to the materials in question remaining on the land in his occupation, and that they were placed there with the assent of the other Defendants, the tenants.

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The other material facts will be found in the arguments and in the judgment.

Mr. Malins and *Mr. Giffard* for the Plaintiff.

It is admitted that *Lawton* and *Miller* are the contractors on behalf of the Corporation. They say they had the consent of the tenants; but by the 84th section of the Lands Clauses Consolidation Act, the consent of the owners also is necessary. Putting waggons, &c. on the land is an entry and taking possession within the meaning of the Act.

They referred also to the 85th section and to the 89th

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section of the Lands Clauses Consolidation Act, as expressly meeting this case. That clause is as follows:—
 “If the promoters or *any of their contractors* shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required, &c. without such consent as aforesaid (*viz.* the consent required by the 84th section), then the promoters are to pay a penalty.”

Mr. *Follett* and Mr. *W. M. James*, for the Defendants.

The case of the Defendants is that they have nothing whatever to do with the acts of the contractors. Those acts took place on the 12th of November, 1851.

[The *Vice-Chancellor* observed that what had been done was obviously harmless, still the acts done by the contractors must be taken as an indication of an intention to do more.]

The affidavit of the town-clerk proves that the Defendants had no knowledge of the acts done by the contractors; that the Corporation never have intended, and do not intend to go on with the works.

[The *Vice-Chancellor*: It is alleged that the acts done were done without the authority of the Corporation; the contractor makes an affidavit, but he does not say that the waggons, &c. were put on the land merely for temporary purposes, and that *he* means to do no more.]

The foreman of the contractor has made an affidavit; he says he placed, in November last, waggons, &c. on the land; that *Winstanley*, one of the tenants, knew it, and did not object; no damage was done beyond what was done to the tenant. There was no unlawful entry, the contractors had a right to enter under their agreement

with the tenants. The Corporation, the Defendants, have not entered at all ; it is not they who are in possession but the contractors, and the Defendants have no control over the contractors. The contract was that no work should be executed, nothing should be done until a direction should be given by the engineer as to the land to be taken, and no such direction has been given. Therefore the entry is not that of the Corporation, not being part to their contract. (The Plaintiff asked for the contract, but it was not produced.) As to the 89th section of the Lands Clauses Consolidation Act, that applies to the tenant in possession, and requires wilful entry. Here there has been no wilful entry, because the consent of the tenant was obtained.

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Mr. *Malins*, in reply.

The acts of the contractors are the acts of the Corporation, and the contractors have placed their waggons and rails on the Plaintiff's land.

[The *Vice-Chancellor* : Is placing waggons, &c. on the land, taking possession ?]

Mr. *Malins* : Placing waggons on the land is an indication of an intention to proceed further. The Plaintiff finds the contractors' plant on his land. He knows the Corporation has power to take his land ; he knows only the Corporation, and the contractors are strangers to him. *Rawes*, the agent of the Plaintiff, says in his affidavit, and that is not contradicted, that the contractors told him it was by the authority of the Corporation that he, the contractor, put the things on the land. His first intimation of their being there was in January, when he inquired of *Lawton*, one of the contractors, by whose authority they were placed there ;

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and *Lawton's* answer was that the Corporation, the Defendants, had given him, *Lawton*, authority to do it. This is sworn by *Rawes*, and not contradicted. The inference is that they will go on to do more. This is the simple case of master and servant, and the rule of law of the master being responsible for the acts of his servant, applies.

March 13.

The VICE-CHANCELLOR :

(His Honor read the notice of motion referred to in p. 1, and then proceeded.) This motion is founded on the assumption that the Defendants have entered into possession, and are continuing in possession of the Plaintiff's land, and on the assumption that they intend, or have indicated an intention, to continue on the land and to execute certain works thereon, contrary to their contract with Plaintiff, and contrary to the powers of the Lands Clauses Consolidation Act. The facts are these:—An Act of Parliament was passed, authorizing the Corporation of *Liverpool* to execute certain works for the purpose of supplying the town of *Liverpool* with water, and by that Act they are authorized to take the lands of the Plaintiff necessary for their purpose, paying or such lands, the amount to be ascertained in the usual manner. Many months ago, the Corporation, intending to proceed under the authority of their Act of Parliament, entered, as they were entitled to do, on the lands of the Plaintiff, for making surveys, taking levels, boring, and otherwise ascertaining how far the lands were necessary. They had authority to do all this, and they did so, having, in so doing, occasioned only slight damage to the tenants, and paying for the damage so done; so far there was no matter of complaint. After this, and after the site of the works had been marked out by the Defendants, no further act was done by them, affecting the

Plaintiff's land. On the 4th of November 1851, the Corporation entered into a contract with Messrs. *Lawton & Miller* to execute the works, undertaking to give them possession of so much of the land as the agent of the Corporation should point out, which has not yet been done. Now, it is contended that what has been done is not done by the Corporation, but by the contractors, and not in accordance with their contract; and that even if the contractors have entered, they have not, in doing so, been the agents of the Corporation. I cannot assent to that proposition, not meaning to say that, in all cases, when there is a contract with a corporation, or any body authorized to do certain things under an Act of Parliament, whatever the contractors may do, his principals are liable; but still, as a general principle, the contractor is the agent of the Corporation. Of course, the contractors might do many things for which the Corporation would not be responsible; but if the contractor enters on the land apparently under his contract, and does anything contrary to the rights of the owner or the provisions of the Lands Clauses Consolidation Act, he must in this Court be treated as the agent of the Corporation. Now, the contract having been entered into in November, 1851, some waggons belonging to *Lawton & Miller*, the contractors, were placed on a part of the lands of the Plaintiff, being a farm occupied by the Defendant *Winstanley*. It appears that the waggons were placed there originally without the permission of *Winstanley* being first obtained. But it appears also, and this is not denied, that *Winstanley* did not object to the waggons brought being left, but assented on being compensated for any damage or loss which should be occasioned to him. This was in November. In the January following, tramways or rails, or in fact some of the implements or utensils of the contractors, were brought on the

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lands of *Winstanley*; that was also done, in the first instance, without the permission of *Winstanley*; but after he knew of it, he assented on the terms of his being compensated. Then as to another tenant, *Morris*, occupying another farm comprised in the Plaintiff's land. In November, before doing any thing, *Lawton* communicated with *Morris* on the subject of putting waggons and rails on his land, and by arrangement with him, placed the waggons and rails on his land. On the other hand *Rawes*, the agent for the Plaintiff, says that neither he, nor *Winstanley*, nor *Morris* gave permission to have the waggons and other things put on the land. Now *Rawes* can, of course, speak for himself, and I assume that he did not assent; but as to the tenants, it is positively sworn by *Lawton*, and confirmed by his foreman, that there was an arrangement both with *Winstanley* and *Morris*. And it is remarkable that both *Winstanley* and *Morris*, though both appearing by their counsel to support the Plaintiff's application, make no affidavits contradicting the allegation that they consented. I must assume, therefore, that both *Winstanley* and *Morris* did, *Morris* previously to the fact, and *Winstanley* subsequently, assent to the waggons, &c., being brought on the land. Then this fact is also stated on behalf of the Defendants, and uncontradicted by the Plaintiff; *Lawton* says, and *Rawes* does not deny it, "I say that in December last, and after the implements mentioned in the bill had been placed on said land in the occupation of said *E. Morris* and *J. Winstanley*, I, together with my foreman, *James Simpson*, was passing along the road near to the premises of said *E. Morris*, when we met *W. Rawes*, the resident agent or steward of the above-named Plaintiff, and said *E. Morris*. *W. Rawes* asked me if I had any objection to paying reasonable compensation for the said materials lying in the said fields. I then informed said *W.*

Rawes, that if the tenants' claim for damage was a reasonable one, I would pay the amount. *W. Rawes* did not object to the materials remaining on the land of *E. Morris* and *J. Winstanley*, nor give any intimation to me that he required said materials to be removed." *Simpson* says he was present at this conversation, and confirms what *Lawton* says. It is therefore beyond contest, that in December the agent of the Plaintiff knew that the materials belonging to the contractors had been placed on the land, and did not object, but stipulated with the contractors merely that reasonable compensation should be made to the tenants. Now *Rawes*, in his affidavit, says, he first became aware of the materials being put on the land early in January. There is a little discrepancy here, between the evidence of *Rawes* and *Lawton*; but it is slight, and not of any material importance. It is, on the whole, clear that at the latter end of December, or quite in the beginning of January, *Rawes*, the Plaintiff's agent, knew that the materials were put on the land, and that so far from any objection on the part of the Plaintiff being made that the acts done were a violation of his rights, he by his agent merely stipulated that there should be some compensation. So the matter stood at the beginning of January. Now *Rawes* says that *Lawton* told him in January, that he put the wag-gons, &c. on the land by the authority of the Corporation, and I will assume that to be true, as it is not contradicted, but there is no doubt that the Corporation did not know of the things being placed on the land, and that no agent of the Corporation knew of it, and what *Lawton* meant was that he, being the contractor of the Corporation, was acting by their authority, but that does not at all impeach the accuracy of the statement made as to the conversation between him and *Rawes*. On the

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23rd of December, the usual notice was sent by the Corporation to the Plaintiff's agent to treat under the Act. That notice was answered on the 12th of January 1852, by a counter notice stating that the Plaintiff was the person entitled. All this time the waggons, tram plates, and rails were lying harmless on the land of the Plaintiff. Nothing whatever was done towards continuing the works; but the waggons and other things simply remained on the land with the assent of the persons who had a right to give it, viz., the tenants in possession; no step was taken towards carrying on the works, and even now the things are lying harmless on the land, and there they would have remained, and the parties would in all probability have gone on to treat amicably, but on the 23rd of January the Plaintiff's *London* solicitor goes down into *Lancashire*, on some business for the Plaintiff; and then, knowing nothing of that which had previously taken place in November, December, and January, he comes upon the Plaintiff's land and finds the waggons and other things placed there. Now, I do not wonder at the solicitor being struck with this circumstance, and having his vigilance aroused, or at his supposing it to indicate an intention to continue proceedings. But Mr. *Smart* did not communicate with the parties there, and get, as he might, full information from them; if he had, he must have heard all that had been done, and would most probably not at once have plunged his client into litigation. But, instead of that, the solicitor came at once to *London*, and without any communication with the tenants, or inquiry whether they had given any consent or not, the bill is filed on the 9th of February, supported by an affidavit by *Smart*, in which, no doubt intending to state what he believed, he omitted that of which indeed probably he knew nothing; he says—"The Plaintiff never, by himself or his agents, in any manner consented to any entry on the part

of the Defendants, or their contractors, agents, or workmen, upon his lands; and further, on the occasion of my going into *Lancashire* aforesaid, I for the first time ascertained as a fact that the said Defendants, by their agents, had entered on part of the land comprised in the said notice, being portions of each of the said two farms, for the purpose of constructing their works thereon." And then he goes on to say:—"The Defendants have, by themselves, their agents, and contractors, entered upon and taken possession, and are now in possession of the land." It is unfortunate that he did not communicate with the parties on the spot, and then with the Defendants. If he had, he would have been informed that the Corporation never had authorized any taking possession of the land; that the Corporation had not taken possession, and that the contractors had obtained the permission of the tenants to leave the things in question on the land. It appears to me that there has been no case for filing a bill at all. It was filed without a knowledge of the facts, and from all that I have stated, I think this was not a case of danger, or even of apparent danger, and not a case for an injunction. The application must, therefore, be refused, and with costs.

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May 27 and
July 2.Receiver.
Sequestration.
Practice.
Contempt.

Under an order of the Court, made in a suit in which it was held that a judgment was a charge on an ecclesiastical benefice, a receiver was in possession of the funds of the benefice, for the benefit of the Plaintiff, subject to a due provision for the service of the church. A subsequent incumbrancer, with notice of the appointment of the receiver, issued a sequestration, and proceeded up to publication, but did not take or receive any funds of the living. Held, that this ought not to have been done, without the leave of the Court; that it was an interference with the possession of the receiver, and was a contempt.

HAWKINS *v.* GATHERCOLE (*a*).HAWKINS *v.* CARRACK, by Supplemental Bill.

IN these suits a motion was made to commit *Carrack*, the Defendant in the supplemental suit, for contempt in issuing and prosecuting up to publication, a writ of sequestration against the tithes and of the vicarage of *Chatteris Nuns*, of which *Gathercole* was incumbent, while a receiver, appointed by the Court in the original cause, was in possession, and with notice of that fact. The order for a receiver to take possession of the tithes of the living of *Chatteris Nuns*, was made on the 21st of November, 1850. The receiver was a Mr. *Burder*. An incumbrance on the same tithes was afterwards created in favour of *Carrack*. The Plaintiff's original sequestration had been long since satisfied and discharged. On the 17th of December, 1851, *Carrack's* solicitor served a notice on the Plaintiff's solicitor, of the mortgage by *Gathercole* and others, of the advowson to *Carrack*, subsequent to *Hawkins'* incumbrance. On the 25th of February, 1852, the Plaintiff filed his supplemental bill against *Carrack*. On the 30th of April, *Carrack* issued a sequestration out of the Court of Queen's Bench; it was lodged on the 4th of May, and published on the 9th of May. The question to be decided

(*a*) Reported, on the question of the validity of the judgment debt, as a charge upon the benefice, in 1 Sim. N. S. 68.

was, whether the publication of the sequestration was a contempt, and whether *Carrack* could be allowed, by a contempt, to gain a legal priority in virtue of his sequestration, so as to defeat the prior equitable right of *Hawkins*.

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Mr. *Stuart* and Mr. *Sidney Smith* for the Plaintiff.

If *Carrack* had not committed this contempt, he would have had no *locus standi* to contest the right of the Plaintiff. Issuing the sequestration is clearly a contempt; for it puts the parties affected by the order for a receiver, in a position in which they must either disobey the order of this Court, or of the Court of law. The hands of the Plaintiff are tied by the appointment of the receiver, so that he could not issue a sequestration, and the Defendant will not be permitted to avail himself of that, to get priority of legal right by committing a contempt. The Defendant *Carrack* may move to discharge the order for a receiver, and if he succeeds he would get priority. Now, if the order for a receiver had not been made, or had been discharged, the Defendant would have had no priority; why should he then be permitted to put himself in a position to get a priority by a contempt of the Court? If it is said that *issuing* the sequestration is not a contempt, at any rate the *publication* is; for by that, every party liable to pay in respect of the profits of the living, has notice not to pay except to the sequestrator. That is an interference with the receiver, and a contempt: *Russell v. East Anglian Railway Company* (a).

Mr. *Malins* and Mr. *Shebbeare* for the Defendant, *Carrack*.

The mortgage to *Hawkins* of the 3rd of August, 1845,

(a) 3 M'Nag. & Gor. 104.

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for 24,000*l.* was not of the tithes, but of the advowson ; and the principal sum is not due till the 8th of August, 1852. As to the effect of the writ of sequestration, the Defendant has done nothing beyond obtaining and publishing the writ and the bishop's mandate.

[The *Vice-Chancellor* : How are the orders of the Crown, commanding the bishop to receive, and his mandate to the tenants and others to pay to him, consistent with the possession of the receiver ?]

We have not received any profits, nor attempted to receive any, but have only proceeded so far as is requisite to raise the question whether the order made as to the Plaintiff's judgment is a right one. That is not an interference with the possession of the receiver ; we have not executed the writ, we have only obtained it, without doing which, not being parties to the original suit, we could not raise the question ; until obtaining the writ we had no charge and could not dispute the validity of an alleged prior incumbrance. Besides the order to the bishop is only to receive if he knows of no impediment ; he would of course refuse to receive, knowing of the appointment of the receiver.

The Court will not commit, unless there is an intentional contempt. Here the bishop knows the fact of the receivership. He will not execute the writ as against the receiver. He can, by force of the writ, only take the goods of *Gathercole* ; it is only operative against them, subject to prior rights ; a judgment was no charge, nothing except publishing the writ of sequestration gave a charge. What we have done is no more than putting the writ into the hands of the bishop that he may use it when the goods are clear, and not till then : in *Russell v. East Anglian Railway Company*, the creditor was not held guilty of any contempt ; nor can he be here. If

anything had been done, it must have been by the bishop, and he would be the person guilty of contempt.

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Mr. *Sidney Smith* in reply.

The Defendant should have applied to the Court for leave; he has mistaken his course; he went beyond what was necessary: the publication of the sequestration gives notice to the tithe-payers not to pay to any but the sequestrator; that is an interference with the receiver's possession, and the party guilty is the party putting the officer in motion. The publication gives priority; if the bishop did not publish, he would be responsible; it is therefore the act not of the bishop, but of the party obtaining the writ.

The VICE-CHANCELLOR:

2nd July.

In this case of *Hawkins v. Gathercole*, the motion was made by the Plaintiff, Mr. *Hawkins*, to commit the Defendant, Mr. *Carrack*, for a contempt of Court, in having interfered with the possession of the receiver appointed by this Court. It appears that the Plaintiff, Mr. *Hawkins*, being a creditor of the Defendant, Mr. *Gathercole*, filed a bill against him, and got a receiver appointed. It is unnecessary to enter into the particulars of the rights of Mr. *Hawkins*, it is sufficient to say that Lord *Cranworth* determined that Mr. *Hawkins* was entitled, upon his bill, to have a receiver appointed of the profits of a living of which Mr. *Gathercole* was the incumbent. Mr. *Burder* was appointed such receiver, and is still the receiver. Mr. *Carrack*, another creditor of Mr. *Gathercole*, having recovered judgment against him for the amount of his debt, issued an execution, and the sheriff having in the ordinary course returned *nulla bona*, and that the Defendant, *Gathercole*, was a clergyman, an ecclesiastic having no lay fee, the usual process

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was issued under the writ of sequestration, from the Court of Queen's Bench, which writ, in the ordinary form, is addressed to the bishop of the diocese as the substitute for the sheriff, sometimes called the ecclesiastical sheriff, directing him to sequester the living of Mr. *Gathereole* in his diocese. The Bishop of *Ely*, in the usual course, issued his sequestration, addressed to the sequestrator (in this case, as it happens, the same gentleman, Mr. *Burder*, who is also the receiver appointed under the order obtained by Mr. *Hawkins*, the Plaintiff); but the bishop issued his sequestration in the ordinary form; and in pursuance of the ordinary course in such a case, that sequestration was published by affixing it upon the doors of the church of the parish of the Defendant. The effect of that sequestration is that the bishop, by the terms of it, does so far as by law he may or can, "sequester all and singular the rents, tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods of the said *Michael Augustus Gathercole*, belonging to the said vicarage and parish church of *Chatteris Nuns* aforesaid, within our jurisdiction, and to the aforesaid *Michael Augustus Gathercole*, the incumbent thereof, belonging or appertaining, and do sequester the same by these presents, and strictly enjoin you (that is, the sequestrator named in the sequestration, Mr. *Burder*) to publish this our sequestration so by us interposed to all and singular that are interested therein, by affixing the same, or a copy thereof, on the door of the parish church of *Chatteris Nuns* aforesaid, or as near thereto as may be, and in other public places, as you shall think proper or expedient in this behalf, and also to ask for, demand, and collect, levy, and receive all and singular the said rents, tithes, oblations, obventions, funds, issues, and profits thereof, and other ecclesiastical goods whatsoever

belonging to the said vicarage and parish church of *Chatteris Nuns*, and to the said *Michael Augustus Gathercole*, as vicar thereof, in whose hands or possession any such are or may be found remaining; and by and out of the same profits and emoluments (if need be) to cause the cure of the said church of *Chatteris Nuns* to be duly served, and to cause all other duties and charges incumbent on the said church of *Chatteris Nuns* to be duly performed, borne, and satisfied, and also well and sufficiently to repair," and so forth. It is not necessary to read further. It is sufficient to say that by the effect of that sequestration from the bishop, the sequestrator named in the document is directed by an authority, which he is bound to obey, to collect, levy, and receive all the profits of this living, and to provide for the service of the church, and then to apply the profits in the ordinary course for the benefit of the creditors. Now the question is, whether the act done by Mr. *Carrack* in procuring that sequestration amounts to a disturbance of, or interference with the possession of the receiver. Now Mr. *Carrack* has done nothing more than in the ordinary course of legal process he was entitled to do, by virtue of a judgment which he had recovered against Mr. *Gathercole*; but it is quite clear that when this Court has appointed a receiver, it will not allow the possession of that receiver to be disturbed by anybody, however good his right may be; but the party thinking he has a right paramount to that of the receiver, or rather to that of the person who has got the appointment of the receiver, must, before he can presume to take any steps of his own motion, apply to this Court for leave to assert his right against the receiver. That is a plain rule, and a very necessary rule: it is not a rule of arbitrary authority, but it is absolutely necessary, because if it were otherwise it would be impossible for this

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Court to administer justice between parties ; and all inconvenience is entirely prevented, from the circumstance that, upon application made to this Court, this Court will always take care to have justice done, and to give any party who has a right paramount to that of the receiver or the party obtaining the receiver, the means of obtaining justice, and will even assist him in asserting that right, and of having the benefit of it. The question, therefore, that I have to consider is not whether Mr. *Carrack* in the abstract, as a matter of right and justice, had a right to issue the sequestration ; unquestionably he had ; but whether he has done anything without the leave of this Court, which has interfered with, or disturbed, or tends to disturb, the possession of the receiver. Now it was argued, and very fairly argued, that although all this has been done, no disturbance has yet taken place ; and that the Plaintiff should wait and see whether the sequestrator as sequestrator, does collect, levy, and receive any portion of the profits of this living, so as to prevent the receiver from getting them. If that argument could prevail, the same argument would authorize a person to bring an ejectment against the receiver ; because it may be said until he has not only got judgment in the ejectment, but has also issued execution and turned the receiver out, until that final act has been done, there is no disturbance of the receiver. It is clear, however, that the Court will not allow the first step in an action of ejectment against the receiver to be taken by any party, without an application having been first made to this Court for its permission to do it. It appears to me that the act in this case does amount to a disturbance of the possession of the receiver. Any tithe payer, or any person liable to pay any of those dues which belong to the incumbent of the living, would be in this predicament, or might be in this predicament, that there is a demand made upon him, or

there might be a demand made upon him for that payment, by the receiver appointed by this Court, and at the same time a counter demand made upon him by a sequestrator appointed by the authority of the bishop of the diocese under the Queen's writ of sequestration issuing out of the Queen's Bench ; and it is quite obvious that the moment the sequestrator appointed does anything whatever in performance of the duty imposed on him by the sequestration, that instant he actually disturbs, in point of fact, the possession of the receiver, and taking steps towards that end appears to me to be doing that which the Court would not permit. It appears to me, then, that Mr. *Carrack* ought before he issued the sequestration (not before he got his judgment against Mr. *Gathercole*, that he was fully entitled to do, and he was entitled to issue a writ of *feri facias* to the sheriff as he did) ; but before he issued the writ of sequestration to the bishop he ought, in my opinion, to have come to this Court stating the facts of the case, and asking leave to do it. What would the Court have done if he had come with that application ? I am satisfied the Court would have allowed him to do exactly what he has done, but upon terms. The Court would have allowed him to do what he has done, for this reason ; It is necessary, in order to give Mr. *Carrack* a position as between him and his debtor, or between him and other creditors of that debtor, and therefore I am satisfied that if application had been made to me in the first instance by Mr. *Carrack* for leave to issue this writ of sequestration, and stating the fact of the return of the sheriff, that there were *nulla bona*, that there was no lay fee, I am satisfied I should have allowed Mr. *Carrack* to have issued this writ of sequestration ; but I should have put him upon terms that he should undertake to deal with that writ entirely in submission to the direction of this Court, and should

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undertake that his sequestrator should not, without the leave of the Court, receive any portion of the profits of this living. Upon those terms, I have no doubt that I should have allowed Mr. *Carrack* to do precisely what he has now done without that permission. Now on the part of Mr. *Carrack*, with reference to what I have been observing as to his position, it was justly represented that to perfect his character as execution creditor, it was necessary to take this step; and it was justly said that Mr. *Carrack*, by the very act of appointing as his sequestrator the same individual, Mr. *Burder*, who is the receiver, has at least indicated that he had no desire practically to interfere with the possession of the receiver; and it was said that Mr. *Carrack* has no wish that the sequestrator should take those issues and profits of the living, but only that the receiver who is the same person as the sequestrator should receive them, and the Court will deal with them. Acting upon that suggestion, I have not the smallest doubt that Mr. *Carrack* will now undertake to do what I think would have been the undertaking he would have given, the undertaking which would in fact have been put upon him if he had applied for leave to take this step; but inasmuch as Mr. *Carrack* has taken this step without the leave of the Court, and has, as it appears to me, justified Mr. *Hawkins* in making this application in order to support the possession of the receiver, I conceive that Mr. *Carrack* must pay the costs of this application; and therefore the order that I shall make will be this; that Mr. *Carrack* pay the costs of this application, and Mr. *Carrack* submitting to deal with his sequestration in such a manner as the Court shall, from time to time, direct, and undertaking that the sequestrator, in that character, shall not receive, collect, or levy any portion of the issues or profits of the living without the leave of this Court, let no further order be made on the motion.

THOMPSON v. FALK.

1852:

*Documents.
Privileged Com-
munications.
Solicitor and
Client.*

THIS was a motion for the production of documents admitted by the Defendants, the *Falks*, to be in their possession. The Plaintiffs were *Thompson* and others, proprietors of salt mines. The Defendants were *R. Falk* and *H. E. Falk*, against whom the motion was made on their joint answer.

Where it is sworn that documents are confidential communications, relating to the particular suit, or to another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit.

This bill was a cross bill. The original bill filed in November, 1850, by the *Falks* against *Thompson & Co.* was for the specific performance of a contract dated 16th May, 1850, for the purchase of some salt mines which were in lease to the *Falks* by *Thompson & Co.* The consideration of the purchase being, in addition to the reservation of royalties, a contract by *Thompson & Co.* to deliver to the *Falks*, rock salt to a certain value, and upon certain terms, the particulars of which it is not material to state at length. The agreement contained a clause for referring any disputed matters to arbitration. The *Falks* had had dealings with Messrs. *Dempsey, Frost, & Co.*, and had made mortgages of the salt mines to *Dempsey & Co.* with powers of sale. In April, 1849, *Thompson & Co.*, the Plaintiffs in the cross suit, contracted to buy up the right of *Dempsey & Co.* in the mines, for 1750*l.*; and by arrangements with *Dempsey & Co.* they paid the money on the 1st March, 1850. On the 7th March, 1850, the *Falks* instituted a suit against the firm of *Dempsey & Co.* (to which *Thompson & Co.* were not parties) to redeem the mortgage to *Dempsey & Co.*; and in that bill the Plaintiffs alleged

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that *Dempsey & Co.* were in fact indebted to them in at least 10,000*l.* In the end, *Thompson & Co.* paid 2500*l.* to *Dempsey & Co.* for possession and for certain other considerations. On the 17th May, 1850, possession was given to *Thompson & Co.* In the original suit of *Falk v. Thompson*, the *Falks* insisted that *Thompson & Co.* were liable to pay certain incumbrances on the mines to *Dempsey & Co.*, and the present cross bill denied any such liability. By their answer to the cross bill, the *Falks* admitted that before the original bill, they and *Dempsey & Co.* had come to an arrangement that in respect to the claim of *Dempsey & Co.* for about 9000*l.* against them, the *Falks*, they should pay 10½*d.* in the pound, making about 480*l.*, and have a full release; and this fact was not stated in the bill of *Falk v. Thompson*. The answer to the cross bill admitted certain documents referred to in the second part of the schedule, to be in the Defendants' possession, as to which privilege was claimed; and the grounds of the privilege were set forth fully in an affidavit filed after the answer, the reception of which, as it did not contradict the answer, but merely supplied deficiencies, was not objected to. This affidavit made by *R. Falk*, one of the Defendants, was as follows: "The following documents, mentioned in the schedule to the answer of myself and the above-named Defendant, *H. E. Falk*, filed in the cause, that is to say, 'Rough notes, rough memoranda, and notices and sketches of instructions for solicitor and counsel in the different equity suits; bills, briefs for counsel in the original and supplemental suits in this Court, of *Falk and others* against *Thompson and others*, in complainant's bill mentioned, letters written and sent to the said *S. Hughes*, (who was Defendant's solicitor,) relating to the matters in the complainant's bill mentioned, as well as to other matters of business, in

which the said *S. Hughes* has acted as the solicitor of the said Defendants, cases, and counsel's opinion thereon, and other papers of a confidential nature contained in the bundle referred to in the said schedule, and therein called a bundle of miscellaneous papers connected with the matters in the said complainant's bill mentioned, and also the fifty-eight letters from the said *S. Hughes*, particularly mentioned and specified in the part of said schedule, entitled 'second part; confidential communications between Defendants and their legal advisers,' are all confidential communications which passed between me, Defendant, and said Defendant, *H. E. Falk*, or one of us, and our legal adviser acting as such legal adviser, in the course of which communications I, Defendant, and said Defendant, *H. E. Falk*, were seeking and obtaining advice from such legal adviser; and they were all written in relation to disputes which, at the time of writing thereof, were pending either between me and the said *H. E. Falk* of the one part, and said Plaintiff of the other part, or between me and said *H. E. Falk* of the one part, and the Defendants, *L. Frost* and *T. Farnworth*, of the other part; and some of them relate to *litigation then actually pending* between me and the said *H. E. Falk*, of the one part, and said Plaintiff of the other part, and others of them to the arbitration in the Plaintiff's bill mentioned; and others of them to litigation actually pending at the time between me and the said *H. E. Falk* of the one part, and said *L. Frost* and *T. Farnworth* of the other part."

The documents referred to by this affidavit were exclusively letters from the Defendant's solicitor to one or other of the Defendants, commencing in May, 1850, and ending in October, 1851.

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Mr. *C. Hall*, for the Plaintiffs, now moved for production of the documents referred to in the second part of the schedule, and in the affidavit above set out.

Mr. *Kinglake* for the Defendants.

Even before the case of *Herring v. Cleobury* (a) the law was, that when the discovery is sought from the solicitor, his privilege is unlimited; *Cromack v. Heathcote* (b), *Ratcliffe v. Furseman* (c). If the law were now even as it was in 1843, still these documents would be protected under the principle of *Lord Walsingham v. Goodricke* (d). They would come within the fourth proposition laid down in that case; for the documents relating to the litigation between the *Falks* and *Dempseys*, also relate to the litigation between *Thompson & Co.* and the *Falks*; *Thompson & Co.* purchased from *Dempsey & Co.* who were the Defendants in the suit of 1850. But secondly, if that were not so, the law as now settled by *Pearse v. Pearse* (e), *Follett v. Jefferyes* (f), and *Reid v. Langlois* (g), is, that the privilege is unlimited, wherever the communications pass between solicitor and client, and is not to be confined to the case where the discovery is sought from the solicitor.

Mr. *C. Hall* in reply.

In this case the litigation between *Dempsey & Co.* and the *Falks*, and the litigation between the *Falks* and *Thompson & Co.*, were not in reference to the assertion of the same right. The litigation, to permit the

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| (a) 1 Phil. 91. | (e) 1 De G. & S. 12. |
| (b) 2 Brod. & Bing. 4. | (f) 13 Jur. 972; 1 Sim. |
| (c) 2 Bro. P. C. 514, Tom. edit. | N. S. 3. |
| (d) 3 Hare, 122. | (g) 1 Mac. & G. 627. |

rule of privilege to apply, must be with reference to the same dispute; *Holmes v. Baddeley* (a). Here the bill filed by the *Falks* against *Thompson & Co.* was for specific performance of the contract of April, 1850. The present cross bill is to set aside an award made under a clause in that agreement, in reference to the payment that ought to be made by *Thompson & Co.*, and there is no necessary connection between the two litigations. In *Follett v. Jefferyes*, and in *Reid v. Langlois*, the privilege is claimed in language showing that the documents related to the matters in dispute either after litigation commenced, or in contemplation of litigation. Here that conclusion cannot be drawn from the language used.

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The following cases were also cited:—*Flight v. Robinson* (b), *Woods v. Woods* (c), *Beadon v. King* (d), *Hawkins v. Gathercole* (e).

The VICE-CHANCELLOR :

The question is, whether the litigation which was pending from the 7th March, 1850, between the *Falks* and *Dempsey, Frost & Co.* was or was not a litigation between the Plaintiff and Defendants in this suit. That suit between the *Falks* and the *Dempseys* was to redeem the mines mortgaged by the *Falks* to them, and the decree in that suit would have been to take an account of the mortgage debt; and the question is, how far the matters in the present suit are the same as in the suit of March, 1850. Now if I could upon authority determine the

(a) 1 Phil. 476.

(b) 8 Beav. 22.

(c) 4 Hare, 83.

(d) 17 Sim. 34.

(e) 1 Sim. N. S. 150.

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abstract point which has been argued, viz. whether the privilege of the client is as extensive as that of the solicitor, I should be glad to remove the anomaly by which it seems that where the solicitor is interrogated, and objects, because it would be calling on him to divulge matters which passed in the relation of solicitor and client, then there is privilege without more, whether such matters relate to an actual or contemplated litigation or not; and yet if the same questions are put to the client, then when *his* privilege is in question, he is to be told that he has a less privilege than he would have through his solicitor, if the latter were questioned. So great an anomaly, so inconsistent and absurd a rule, I should be glad to take on myself to say is not the rule of this Court, and that there is no such distinction. When *Reid v. Langlois* was cited to me, it did appear at first sight, that it established the broad proposition contended for, and I should certainly have followed that case if it did so; but on further examination, though that case does not establish the contrary, yet I think it was not the intention of Lord *Cottenham* to lay down the general proposition: that point he did not decide; nor do the cases of *Pearse v. Pearse*, and *Follett v. Jefferyes* so lay it down, as to enable me to say I can follow them. If that point is to be decided, it must be by a higher authority than mine.

But it appears to me that, under all the circumstances of this case, the privilege ought to apply. It is admitted that the documents in question are communications which passed between the 7th March, 1850, and the 30th of October, 1850. The first date is that of the bill filed by the *Falks* against *Dempsey & Co.*, and the latter is the date of the award made under the arbitration contained in the agreement of the 16th May,

1850, between *Thompson & Co.* and the *Falks*. The affidavit in which the ground of the privilege is stated, after enumerating the documents (which are only correspondence, that is, the documents contained in the second part of the schedule), states as follows:—"That they are all confidential communications," &c. (The Vice-Chancellor read the passage in the affidavit set out in p. 23.) The affidavit does not specify which related to the litigation between the *Falks* and *Dempsey & Co.*, and which related to the litigation between the *Falks* and *Thompson & Co.* But they all relate to one or other of those litigations. Now the material question is, whether the litigation between *Dempsey & Co.* and the *Falks*, in the suit commenced on the 7th March, 1850, relates to the same matters and refers to the assertion of the same right, with reference to the position of the parties, as the litigation in the present suit. The present suit is to carry into effect the agreement between *Thompson & Co.* and the *Falks* of May, 1850, and to set aside the award made in pursuance of the arbitration, and to seek other relief by *Thompson & Co.* as against the *Falks*; and *Thompson & Co.* would have to establish in this suit, what was the position of the *Falks* in their character of mortgagors. That is also the subject of the litigation in the suit of March, 1850. At that time the present Plaintiffs were purchasers of the estate vested in *Dempsey & Co.* as mortgagees. The litigations are not, it is true, strictly the same; but I think the circumstances of the case come within the principle of those in which the Court has held, that, confidential communications made in relation to matters in contemplation of litigation, in which the issue is the same, ought to be protected. The consequence is, that the documents comprised in the second part of the schedule must be protected from production.

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 FALK.

1852:
24th and 31st
May.

Will.
Mortmain.
Legacy ; Debt.

A testatrix directed a sum which she said she owed to A. and B. on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being of such school, now or hereafter to be built."

The testatrix did not in fact owe the money to A. and B., but intended it to be held by them on a secret trust for the use of the existing chapel. She did not tell them of this in her lifetime, but told her executor ; and A. and B. never knew of the intention till after the testatrix's death.

Held, 1st, on the question of the validity of the residuary gift, that it was not good even as to the personal estate, as it would be a due execution of the trust to devote the money to building a school-house.

2ndly, that whether there was a valid debt or not on the promissory note to A. and B. was a question of law ; but if there was no debt, it was good as a legacy.

LONGSTAFF v. RENNISON.

THE will of *Margaret Clay* was as follows :—" I order and direct particularly the debt of 350*l.* and interest which I owe to the Rev. *J. Donald Carrick* and the Rev. *G. Sample*, and for the security of the payment of which I have given them my promissory note payable to them or their order on demand, and all other my just debts and funeral and testamentary expenses, to be paid by my executors hereinafter mentioned ;" and then after various gifts she went on thus : " And as to all the rest, residue and remainder of my trust estate, monies, chattels, and premises, after payment of the before-mentioned legacies, debts, and personal and testamentary expenses, and the expenses of proving and carrying into execution of the trusts of this my will and all expenses incident thereto respectively, I will and bequeath and direct my said trustees and the survivors of them, and the heirs, executors, administrators, and assigns of such survivor, to pay and apply the same towards establishing

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a school in connection with the Baptist Chapel of *North Shields* for the time being, and to pay the same over to the treasurer for the time being of such school *now or hereafter to be built*, whose receipt shall be a good discharge," &c. The will was dated in March, 1844: the testatrix died in May, 1845. The trustees and executors of this will were *J. Rennison* and another. The will was proved by *Rennison* alone. A suit was instituted by the Plaintiff, the brother and heir at law of the testatrix, for the administration of her estate, and a decree was made in July, 1846, under which the Master made his report; and the following are the material facts found by that report. The promissory note mentioned in the will was dated the 28th March, 1844, and was delivered to the Defendant *Carrick* by *Rennison* in July, 1844, *Rennison* having received it from *Laing*, the attorney of the testatrix. The testatrix had made and signed the note freely and voluntarily, and there was no debt due from her either to *Carrick* or *Sample* at the time of the making and signing of the note. There was no agreement or understanding between *Carrick* and *Sample* and the testatrix as to the mode in which the proceeds of the note were to be applied; nor did either *Carrick* or *Sample* do any act, or make, or (in the lifetime of the testatrix) receive, any communication to or from the testatrix or any other person from which any charitable or other trusts of the promissory note could be implied. Some time before her death, however, the testatrix informed *Rennison* that she had made the promissory note, and that it was in the hands of *Laing*, her attorney; and she authorized *Rennison* to obtain it and to deliver it to *Carrick* and *Sample*; and she told *Rennison* that she wished the amount to be applied by *Carrick* and *Sample* for the use of the Baptist Chapel in *Stevenson-street, Tyneworth*, and she had no doubt they

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would so apply it; but she told him shortly afterwards not to mention her intention to *Carrick* and *Sample* till after her death. *Rennison* gave the note as soon as he received it from *Laing*, to *Carrick*; but he did not then, nor did he during the lifetime of the testatrix, inform *Carrick* or *Sample* what were the wishes of the testatrix as to the application of the note, and they never were informed, during the testatrix's lifetime, of her wish that the money should be applied for the benefit of the Baptist Chapel; her wishes on this subject were communicated to *Carrick* and *Sample* after her death.

The Master found these facts as special circumstances, and found that the sum of 350*l.* secured by the note was a legacy, but subject to the opinion of the Court.

The cause now came on on further directions, and the questions were, whether the 350*l.* was a debt or a legacy, and whether as a gift for establishing the school, it was void.

Mr. *K. Parker* and Mr. *H. Clarke*, for the Plaintiff.

The testatrix has treated the 350*l.* as a debt. However, the Master has found that it is not a debt. It is not a legacy: the language of the will is, "the debt which I owe." No doubt the testatrix meant her debts to be paid, but that will not make this a debt if it is not a legal debt. But as she treated it as a debt, she did not intend a legacy (they cited *Godol.* 271). The promissory note is included in the testatrix's description of her debts, and therefore it cannot take effect as a legacy; *Briggs v. Penny* (a). It appears, by the special cir-

(a) 3 De G. & Sm. 525; 13 Jur. 905; and on appeal, 3 Macn. & Gord. 546.

circumstances found by the Master, that the testatrix informed *Rennison* of her having made the promissory note, and delivered it to her solicitor, and that it was her intention to give it on a secret trust, and she directed him to get it and hand it over to the payees. If it is treated as forming part of the residue, it is bad, being given for establishing a school, which imports bringing land into mortmain; *Pritchard v. Arbousin* (a), *Trye v. Corporation of Gloucester* (b).

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Mr. *Smythe*, for *Carrick*, the holder of the note, claimed the 350*l.* as a debt. First, the will must be thrown out of consideration. The testatrix has made a promissory note, and the question is her liability upon it. A promissory note imports consideration, and the burden of proof of no consideration, is on the party resisting payment; *Tate v. Hibbert* (c), *Milnes v. Dawson* (d). Secondly, if the will is to be looked at, it amounts to a direction to the executors not to plead no consideration; or if this is not actually a debt, the will amounts in effect to a direction to the executors to pay it out of her estate; the testatrix falsely recites a non-existing debt, and directs it to be paid. It is clear she meant a payment, and she declares the trusts on which she intends the payment. That is a good gift; *Schloss v. Stiegel* (e), *Rishton v. Cobb* (f), *Giles v. Giles* (g); see also *Tate v. Hibbert* (h). There is therefore a good debt, or a direction to pay which is equivalent to a legacy.

Mr. *Lee*, for *Rennison*.

There is a good claim either for a debt or for a legacy

(a) 3 Russ. 456.

(b) 14 Beav. 173.

(c) 2 Ves. 111.

(d) 5 Exch. 948.

(e) 6 Sim. 1.

(f) 5 Myl. & Cr. 145.

(g) 1 K. 685.

(h) 2 Ves. 111.

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for the benefit of the chapel. For the latter purpose, the residuary gift is good, for there is nothing in it making it necessary to lay out the money in building, or bringing land into mortmain. He cited *Att.-Gen. v. Williams (a)*, and *Att.-Gen. v. Stepney (b)*.

Mr. *W. M. James*, for the Attorney-General.

Mr. *K. Parker*, in reply.

The real question is, is this a debt or a legacy? There is nothing testamentary about it, and it is not a legacy, and the Master has found it is not a debt; it must therefore go to the Plaintiff, unless it passes by the residuary gift as a gift for the school. As to that, in the *Att.-Gen. v. Williams*, there was no intention expressed of building; here there is an express reference to the school *now or hereafter to be built*, which shows an intention to build, and for that purpose to bring land into mortmain. In *Trye v. The Corporation of Gloucester*, the land was already in mortmain; but here there is no land in mortmain, no schoolhouse already erected: if the will is to be carried into effect, land must be got, and brought into mortmain.

The VICE-CHANCELLOR said he was not satisfied of the correctness of the Master's finding that the 350*l.* was given as a legacy, and the primary question was whether it was a debt. That question his Honor thought was purely legal, and must be determined in a case to be sent to law, in which the question would be whether at the death of the testatrix any and what debt was due from her to *Carrick and Sample*. On the question of the gift

(a) 4 Bro. C. C. 526.

(b) 10 Ves. 22.

in the residue for establishing a school, his Honor continued thus :—"There is no doubt that whatever of real estate, or of personal estate savouring of realty, is given as residue for that purpose, the gift is void. But the question is whether the *pure personality* comprised in the residue is well given for the purpose mentioned. (The *Vice-Chancellor* referred to the residuary clause, and continued.) Now, the question is whether that is void, on the ground that in the execution of the trusts, the acquisition of real estate is involved for establishing the school. I have been referred to the case of the *Attorney-General v. Williams*, which is reported in 4 *Bro. C. C.* and better in 2 *Cox*, and I shall refer, in observing upon it, to the better report. (The *Vice-Chancellor* stated the circumstances of that case, and proceeded.) Now in that case there was no gift of the *corpus* to establish the school. It was to pay out of the dividends 30*l.* to the school master, and the overplus of the dividends and proceeds to be applied in buying books, things, &c. ; in effect there was to be no application even of the dividends, to buy land or lodging. It would have been a clear breach of trust to apply the *corpus* to buy land, and that was the ground of the decision. The Lord Chancellor said :—"The Court is tied up to apply those funds in the supply of certain articles for the use of the school, whenever this school shall be established ; but it is clear that no part of the fund is to be applied in building or establishing the school."

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But in the case before me, the *corpus* is given on trust to pay the same to the treasurer ; and it is true that the school might be established without buying land or building, but the question is, whether it would be a due execution of the trust to buy land. It appears that

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there was no school, and I think it would be a due performance of the trust to buy land and build a school-house; and to apply the money in that way, would be a due application of the money. Further, the testatrix clearly contemplated the building of a school; for she says the trustees are to pay the same to the treasurer for the time being, of the school now or *hereafter to be built*. This then is a case in which, although if a school-house were in existence, it would be possible to apply the fund towards establishing a school without buying land; yet there being no such school, it would be a due execution of the trusts to apply the money in buying land for the purpose. I think, therefore, that this case comes within the statute, and I must declare the gift of the residue as to the personal estate in favour of the school, void.

The parties being anxious to avoid the expense of a case to a Court of law, referred to the Act 14 & 15 Vict. c. 83, s. 8, and asked the Court to call in the assistance of a common law Judge upon the question of the legal effect of the promissory note. The *Vice-Chancellor* held that the act only extended to the Vice-Chancellors, the power formerly held by the Lord Chancellor, and did not extend to the taking from a Court of law the consideration of a purely legal question, especially a question connected with the forms of pleading at common law. The parties then by consent elected to take his Honor's opinion on the question whether the 350*l.* was a debt or not, and if not, whether it was a legacy; and the case stood over on that point.

31st May.

The VICE-CHANCELLOR on this day gave judgment as follows.

The testatrix on the same day on which she made

her will, executed a promissory note for 350*l.*, by which she promised to pay to *Carrick* and *Sample* 350*l.* with interest at 5*l. per cent.* for value received. In fact, it was without consideration; she did not deliver it on the day on which it was made, to the payees, but she delivered it to her solicitor; and it is proved by *Rennison* that he was directed by the testatrix to get the note and to hand it over to the payees; and she communicated to *Rennison* her purpose as to the disposition of the money, and wished that purpose not to be communicated to *Carrick* and *Sample*. On the same day on which the testatrix made the note, she also made her will, and in it she refers to the note in these terms. (His Honor read the passage in p. 28.) So that she describes and recognises the 350*l.* as a debt, and directs that, and all her other debts to be paid. Now, the Master has found that in his opinion the 350*l.* is a legacy, submitting, however, the question to the Court. It is very questionable upon the authorities, whether a Court of law would determine this to be a legal debt, and therefore my original determination was to send to a Court of law the question whether it is a debt or not. But considering that if it is not valid as a debt, it is valid as a legacy, and as it is immaterial in which way it is taken, that is, whether it is valid as a debt or as a legacy, except that if it is a debt, it is not liable to legacy duty, and takes priority over the legacies; and as the claimants are willing to take it as a legacy, I think I may affirm the report, and declare that the 350*l.* is a good legacy, and then it will pay duty and have no priority. I must, at the same time, declare that it is due as a legacy on the trusts declared by the testatrix.

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M'LEOD v. LYTTLETON.

1852:

27th March.

Practice.
Amending Bill.
General Orders;
Construction of.

The 67th and 68th Orders of 1845 apply to an application to the Court, as well as to an application to the Master.

A motion for leave to amend, by striking out the name of a Plaintiff and making him a Defendant, must be supported by the affidavits required by the 67th and 68th Orders of 1845.

THE Bill was filed by *John M'Leod* and *Lucy M'Leod*, seeking to fix one of the Defendants with a breach of trust, and a motion was made by the Plaintiffs for leave to amend, by striking out the name of the Plaintiff *J. M'Leod* as Plaintiff, and making him a Defendant, and *otherwise as the Plaintiffs should be advised*. The amendment by converting the Plaintiff *J. M'Leod* into a Defendant, was rendered necessary by the circumstance, that certain acts had been done by the Plaintiff *J. M'Leod*, which precluded him from suing, so that if the record remained unaltered, there would be misjoinder. The nature and necessity of the general amendments desired by the Plaintiffs are not material for the purpose of the decision in this case, which turned upon the construction of the 67th and 68th General Orders of 1845, the principal point argued being, whether a special application for leave to amend after the proper time for amending has passed, or when the amendment is one for which it is not within the jurisdiction of the Master to give leave, can be made to the Court, without the affidavits required by the Orders of 1845 referred to. The 67th Order declares that "A special order for leave to amend a bill is not to be granted without affidavits to the effect, first, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and, secondly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the Plaintiff." The 68th Order declares that "after the Plaintiff has filed or undertaken to file a replication, or after the

expiration of four weeks from the time when the answer or last answer is deemed sufficient, a special order for leave to amend a bill is not to be granted, without further affidavits showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill."

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In this case the answer was put in in the month of August. The Plaintiff *J. M'Leod* was resident in *Demerara*, and pending the proceedings, the Plaintiffs' original solicitor retired, and a new solicitor was appointed. The four weeks from the time when the answer would be deemed sufficient, expired about the 31st January, 1852. The other material facts are stated in the judgment.

Mr. Karslake for the Plaintiffs.

This application is one proper to be made to the Court, and not to the Master. The Master has jurisdiction to give leave to amend the bill, that is, to alter or add to the statements made by it, but not to alter the whole frame of the record. But in a case where by inadvertence or from ignorance of the facts, a Plaintiff who cannot sue is associated with one who can, the Court will itself give leave to make such an amendment as that which is asked: *Hall v. Lack* (a). He was proceeding to argue that upon the merits disclosed by the affidavits, the Plaintiff was also entitled to have leave to amend by introducing various further allegations into the bill, when it was objected by

Mr. Malins and *Mr. Renshaw*, for the Defendant, that the motion was not supported by such an affidavit as the

(a) 2 You. & Col. 631.

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Orders of 1845 require. Those Orders require certain things to be done, before a special order for leave to amend can be made; and those things must be done, as well when the application is to the Court, as when it is to the Master. The four weeks after the answer must be deemed sufficient, have elapsed; and therefore the case is within the 68th Order. Even if such an affidavit as that required by the 67th and 68th Orders could be dispensed with, in regard to the amendment specifically pointed out on the notice of motion, here the notice of motion goes much further; it asks for leave to amend generally. Besides, the Plaintiffs are too late to obtain leave to amend by converting one Plaintiff into a Defendant. In *Hall v. Lack*, it did not appear that the Plaintiff was out of time; but here he is. The Court will not at the hearing give leave to amend to cure misjoinder, but will dismiss the bill at once: *Cowley v. Cowley (a)*. *Stuart v. Lloyd (b)*, was also cited.

Mr. *Karslake* in reply.

The argument on the other side, upon the 67th and 68th Orders of 1845, is applicable only, if at all, to that part of the notice of motion which seeks leave to amend generally. It is clear that, as to so much of the intended amendment as is pointed out on the face of the notice of motion, no affidavit can be requisite. But further, these Orders have exclusive reference to applications made to the Master, and were not intended to apply to special applications to the Court. The material amendment here proposed is to strike out *J. M'Leod's* name as a Plaintiff, and make him a Defendant; that amend-

(a) 9 Sim. 299; but see *Davis v. Prout*, 7 Beav. 288.

(b) 3 M. & G. 181.

ment is clearly stated to the Court by the notice of motion, which gives to the Court information of the nature and extent of the amendment as precise as could be afforded by a draft of the amendment.

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He was proceeding to argue that he was entitled to have also the general leave to amend, when he was stopped by the Vice-Chancellor, who said the Plaintiff's counsel must elect whether he would ask for leave to amend generally, or to amend only by altering the state of the pleading on the record. Mr. *Karslake* elected to confine his application to the latter amendment, and cited further, *Bather v. Kearsley (a)*.

The VICE-CHANCELLOR.

Upon the point whether, if no difficulties could arise either as to the time that has elapsed, or as to the effect of the Orders of 1845, this would be a proper case for leave to amend the bill, in the limited manner asked, I have no doubt that it is a proper case. Two *cestuis que trust* file a bill for making a trustee responsible. The Defendant states that one of the two Plaintiffs has done acts precluding him from asking the relief sought; as to the other Plaintiff, no such facts are alleged. If the case were to go to a hearing with both Plaintiffs, then, although Miss *M'Leod* may have a substantial right, she may lose it by the misjoinder of Mr. *M'Leod* with her as a co-plaintiff. *Bather v. Kearsley (a)* shows that the Court will allow such an error to be rectified. If then the application were made in a case in which no question could arise either as to lapse of time, or as to the effect of the 67th and 68th Orders of 1845, I should have no hesitation in making an order on the

(a) 7 Beav. 545.

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same terms as in *Bather v. Kearsley*. The question here, how far there is any reason for not making the order, arising out of the time which has elapsed, is in consequence of the exigency of the 67th and 68th Orders. The answer was filed in August; the fourth week after the answer was sufficient ended about the 21st January. After that the Defendant might have moved to dismiss for want of prosecution. Now, I am satisfied that, although in such a state of things if the amendments were to be made under ordinary circumstances, the proper course is for the Plaintiff to go to the Master in the first instance for a special order to amend, yet in a case where the amendment goes not merely to amend the bill, but to alter the whole frame of the suit, the Master has no jurisdiction. Therefore, it is a proper case in itself to come to the Court. But I am of opinion that the 67th and 68th Orders of 1845 apply as well to an order made by the Court, if the application is made to the Court, as to an order made by the Master, if the application is to him. The language of the 67th Order is, "A special order for leave to amend a bill is not to be granted without affidavits to the effect, first, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and, secondly, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the Plaintiff." So that no order is to be made without the affidavit, not merely no order by the Master, but no order at all. Although, therefore, the application is proper to be made to the Court, the 67th and 68th Orders are applicable. In this case more than four weeks have passed since the answer was to be taken to be sufficient. So that the 68th Order applies, and under that Order, not only what is required by the 67th is also required, but more; the 67th Order re-

quires, first, an affidavit that the draft has been settled by counsel; that is not done here; then the affidavit must show that the amendment is not made for delay; now there is such an affidavit. Then the 68th Order requires an affidavit showing that the matter is material (that we have in this case); and that the amendment could not with reasonable diligence have been sooner introduced into such bill.

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This last part of the Order is susceptible of a double interpretation. It may mean that the amendment could not be made at any earlier stage, or that the application for leave to amend could not have been made earlier. If the former is the meaning, it is clear that the amendment could not at any earlier stage have been introduced. It could not, of course, have been introduced at the filing of the bill. But taking the other to be the construction, is there any want of due diligence in making the application? Considering the nature of the case, the absence of one of the Plaintiffs in *Demerara*, and the change of solicitors, I think there is not that want of diligence which ought to induce me to refuse the application. The only matter remaining in which the Orders have not been complied with is this, that there is no affidavit showing that the draft has been settled and signed by counsel. It is said that there is nothing special in the amendment; but still that ought to have been done, according to the Order. But I think I ought not to refuse to make this order, because that has not been done. I shall give leave to the Plaintiff to file an affidavit, and if any additional expense is thereby incurred, the Plaintiff must pay it. The motion will therefore stand over for the Plaintiff to make an affidavit that the amendment has been settled and signed by counsel; and the Plaintiff paying the costs of the mo-

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tion and giving the usual security for costs, the order will be for leave to amend merely by striking out the name of the Plaintiff *John M'Leod*, and making him a Defendant.

1852:
 20th and 24th
 January,
 15th March,
 and 12th June.

Dower.
 Election.
 Will.
 Construction.

GIBSON v. GIBSON.

ROBERT GIBSON, by his will, dated the 8th October, 1844, gave to his wife his furniture, plate, linen, and all and other his effects in and about his dwelling-house. He also gave to her his leasehold dwelling in *Grove-street*. He devised and bequeathed all his free-

A testator gave to his wife certain chattels and leaseholds, and certain pecuniary benefits. He gave all his freehold messuages, lands, tenements, and hereditaments, and all the rest and residue of his leasehold messuages or tenements and premises whatsoever and wheresoever, to trustees *for all his estate and interest* therein respectively, upon trust to sell his freehold and leasehold messuages or tenements, hereditaments, and premises, &c., and to stand possessed of the monies to accrue from such sale, upon certain trusts.

He directed that, until sale, the rents and profits should be applied in the same manner as he directed as to the income of the monies to arise from the sale. He gave the produce of the sale of his freehold, copyhold, and leasehold estate, and of his residuary personalty, as to one-fourth to his wife, as to one-fourth to one of his sisters for life, remainder to other relations, one-fourth to another sister, remainders over, and one-fourth to other persons.

Before his will, he had sold some of his freehold estate; and his wife had joined to bar dower.

Both before and after his will, he had contracted to lease parts of his freehold estate; after his will, he had contracted to sell one of these parts to the lessee; and after his will, he agreed to let some part of his freeholds, with liberty to the lessee to pull down buildings and erect others. After his death, the lessee of the last-mentioned premises did pull down the buildings and erect others, thereby improving the value of the estate.

Held, first, that the widow was not put to her election, but was entitled to her dower, as well as to the benefits given to her by the will.

Secondly, that the acts by which the value of the property was increased, not being hers, she would take her dower according to the existing value.

hold messuages, lands, tenements, and hereditaments, and all the rest and residue of his leasehold messuages or tenements and premises whatsoever and wheresoever, to trustees, *for all his the testator's estate and interest therein respectively*, upon trust to sell his said freehold and leasehold messuages and tenements, hereditaments and premises, &c., and to stand possessed of the monies to arise from such sale, upon the trusts thereafter declared.

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Then there was a clause "that in the mean time, and until his said freehold, leasehold, and copyhold (the testator, however, had no copyholds) estates and property should be sold and disposed of under the trusts and directions in that behalf thereinbefore contained, the rents and annual profits thereof should go and be applied in such and the same manner as thereafter explained and declared, and thereafter stated of and concerning the annual interest of the monies to arise from the sale of the same hereditaments and premises."

The testator gave 4000*l.* *East India* stock upon trust, to pay the interest thereof to his wife for her life, with remainder over on the same trusts as declared of his residuary personal estate. And he gave his residuary personal estate to his trustees on trust to convert the same; and he declared the trusts of the money to arise from the sale of his freehold, copyhold, and leasehold estates directed to be sold, and of the produce of his residuary personal estate to be, as to one-fourth part thereof for his wife absolutely; as to another fourth part for one of his sisters for life, and after her death for other relatives described; as to another fourth part for another of his sisters for life, with remainders over; and as to the remaining fourth part for other persons.

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The testator was married in 1829, and died in October 1847, leaving his wife surviving; and the principal question was, whether she was entitled to dower out of the real estate of which the testator was seised in fee simple, and also to the benefits given to her by the will, or whether she was put to her election.

It was admitted that the testator before the date of his will sold certain of his freehold estates of which his wife was dowable; and that she joined in the conveyance thereof to release her dower.

It appeared also that he had contracted to lease parts of his freehold estates both before and after his will, that is, in June, 1844; and before the date of his will he agreed to let some part of his estate situate at *Hornchurch*, in *Essex*, for three years, and to give to the lessee a term of seven or fourteen years, at the option of the lessee, at a rent of 120*l.* a year. That after the date of his will, he entered into a contract for the sale of his estate at *Hornchurch* to the lessee, but such contract had not been carried into effect. That in October, 1846, he entered into an agreement to grant a lease of other part of his property, with liberty to the lessee to pull down the buildings thereon, and build others, for seventy years, at a rent after the first half year of 110*l. per annum*, with an option to purchase, and after his death the trustees of his will, in pursuance of his contract, granted such lease, with such option to purchase; and the lessee did, after the testator's death, pull down the buildings and build up other new ones, to the great improvement of the property. The Plaintiffs were the persons interested in the three-fourths of the produce of the sale of the testator's freehold and resi-

duary personal estate. The substantial Defendants were the widow and the trustees.

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Mr. *Bethell* and Mr. *Rogers*, for the Plaintiffs.

The principle of the cases on this subject is, that if you can point out any part of the will which is inconsistent with the right to dower, the widow is put to her election. Thus, where there is a power of leasing, the widow is put to her election. Here, the testator has put his widow on an equality with the other members of his family; he gives her one-fourth of his estate, and one-fourth to each of three other branches of his family; *Chalmers v. Storil* (a). The real and personal estate are mixed, and are given in fourths to the widow, and the other three branches of the testator's family, as in *Chalmers v. Storil*. The testator intended equality, and the widow will not be allowed, by taking her dower, to introduce inequality. The whole scheme of the will will be defeated if the widow takes her dower; *Miall v. Brain* (b), where a portion of the estate was directed to be enjoyed in a manner inconsistent with the claim of dower, and the widow was put to her election.

Another class of cases where the widow has been put to her election, is where there is a gift of a rent-charge, with powers of distress, or powers of managing or leasing are given; *Roadley v. Dixon* (c), *Hall v. Hill* (d), *Lowes v. Lowes* (e), *Grayson v. Deakin* (f). The last case appears to have been decided on the leasing powers; *Robinson v. Wilson* (g) also turns on there being a power of leasing.

(a) 2 Ves. & B. 222.

(e) 5 Hare, 501.

(b) 4 Madd. 119.

(f) 3 De G. & Sm. 298.

(c) 3 Russ. 192.

(g) 13 Irish Law and Eq.

(d) 1 Dru. & War. 94.

Rep., Cas. in Eq. 168.

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The present case falls within the principle of these authorities: a power to lease, it is clear, furnishes an indication of intention to exclude dower. How can it be said that a power to sell will not interfere with an allotment of dower? the trustees must either sell the estate in a mangled form, or must sell two-thirds in possession, and the remaining one-third in reversion. In effect, a power of sale is more inconsistent with an intention that the claim to dower shall remain, than a power of leasing; for it must be inferred that the testator intended the whole estate to be sold, that is, the estate exonerated from the claim to dower. Besides, in this case, the will makes an ample provision for the wife, and principally out of the proceeds of the sale of the very estates. Again, at the death of the testator, at which time the will speaks, he had contracted to sell part of his estates; so that he had converted part of them into personalty, and that conversion will be materially affected if the widow can claim dower; the contract could not be carried into effect as to one-third.

Mr. *Walker* and Mr. *Baggalley*, for the trustees, argued in the same interest as the Plaintiffs.

They relied on the trust for sale; *French v. Davis* (a): on the direction for the application of the rents until sale, which is inconsistent with the claim to dower; *Villa Real v. Lord Galway* (b), *Jones v. Collyer* (c). They cited also *Birmingham v. Kirwan* (d), *Daly v. Lynch* (e). Then as to the contract to let part of his property to a tenant, with liberty to pull down buildings and erect new ones, for a term of seventy years, with

(a) 2 Ves. jun. 572.

(b) Amb. 682.

(c) Amb. 730.

(d) 2 Sch. & Lef. 444.

(e) 3 Bro. Parl. Cas. 478.

an option to purchase, which option has not been exercised; if the widow can claim dower, that is, one-third in specie, she defeats that lease. So, with regard to the *Hornchurch* property, the testator's contract to sell it converts it into personalty as against all parties claiming under the will; if the widow can claim her dower, she prevents the contract being carried into effect; that is defeating the will; and the principle of the cases is, that if the claim of dower will defeat the will, it is a case of election.

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They referred also to *Parker v. Downing* (a), *O'Hara v. Chanis* (b), *Roberts v. Smith* (c), *Reynolds v. Torin* (d), and to *Ellis v. Lewis* (e), in which the claim of dower was allowed; but in that case they argued that the trusts for sale were only to sell as the testator himself could sell, viz. subject to dower; besides, there the disposition was of real estate only, whereas in *Chalmers v. Storil*, and *Dixon v. Robinson* (f), the disposition was of real and personal estate mixed.

Mr. *Rolt* with whom was Mr. *S. F. Williams*, for the widow.

The principle is this; It is not enough that you do not find upon the will that the testator intended his widow to have both dower and the benefits conferred by the will; you must find an expression of intention that he intended her not to have both. Here the devise is not of the testator's lands, but of his estate and interest therein; nothing beyond his estate is given to the trustees. As to the trust for sale, there is no authority for say-

(a) 4 Law J. 198.

(b) 1 Jones & Lat. 662.

(c) 1 Sim. & Stu. 513.

(d) 1 Russ. 129.

(e) 3 Hare, 310.

(f) Jac. 503.

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ing that such a trust excludes the widow: *French v. Davis* (a), *Ellis v. Lewis* (b), are directly the other way.

As to the application of the rents directed until sale, the testator refers to those rents which are part of *his* estate; that is, the estate which remains to him after his widow's dower is satisfied; he means his own rents, not the rents of his widow's estate; for if the trust for sale is a trust for sale only of his own estate, the rents of the estate to be sold must refer to the same estate, that is, of the estate subject to dower.

In *Miall v. Brain* (c) the direction to the trustees was to deal with a specific thing, as the testator might have dealt with it in his lifetime; he meant the legatee to use and occupy the whole house. As to cases of annuity, a gift of an annuity without more does not affect the right to dower. *Roadley v. Dixon* was not a case of mere gift of an annuity; there there was a direction to use and occupy a particular farm. In *Hall v. Hill* the Court went upon the whole will, relying, however, principally on the leasing power.

The first point made against the claim of the widow is, the conversion of the real and personal estate in one trust, and the gift of the whole in equal shares. But in *French v. Davis* there was also the conversion of both properties, and in that case the testator intended the residue to go in equal shares respectively to three persons, one of whom was the widow. What is decided by *Chalmers v. Storil* and *Dixon v. Robinson* is this, that

(a) 2 Ves. 572.

(b) 3 Hare, 310.

(c) 4 Madd. 119.

to exclude the widow there must be a blending of the real and personal estate, and also a gift in perfect equality; either alone will not do.

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He also cited *Lawrence v. Lawrence* (a), *Dawson v. Bell* (b), *Holditch v. Holditch* (c).

On the 15th March the argument on behalf of the widow was resumed by Mr. *S. F. Williams*, following Mr. *Rolt*.

If any argument can be derived from the large amount of the provision made by the will for the widow, it is rather for than against her: it shows an intention in her favour. The state of the testator's property at the date of his will has been adverted to. Even if that could be looked at, there is not before the Court sufficient evidence of what it was. But it cannot be looked at: *Dummer v. Pitcher* (d), *Doe v. Chichester* (e).

Hall v. Hill does not decide that a leasing power alone excludes dower: *Robinson v. Wilson* goes clearly on a wrong principle, for it assumes that the widow is excluded unless the testator shows on the will an intention to give her both provisions; whereas the true principle is, that to exclude her dower you must find an expression of intention, that he intended her not to have both. But whether a leasing power does, or does not exclude the widow, here there is no leasing power, but a power of sale, which is very different.

As to the quantum of the widow's interest, if she has

(a) 3 Br. P. C. 483.

(d) 2 Myl. & K. 262.

(b) 1 Kee. 761.

(e) 4 Dow, 65.

(c) 2 You. & Coll. 18.

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a title to dower at all, she is entitled to the value of the dower at the time when her claim is made. She is entitled to have it set out by metes and bounds as she finds it, and therefore to the value at the time when the dower could be so set out : *Riddell v. Gwinnell* (a).

Mr. Rogers in reply.

As to the cases upon a gift of an annuity : it has been held that a gift of an annuity simply is no bar ; but if there is a power of distress, that raises a case of election. But the 4 *Geo.* 2, c. 28, gives a right of distress for all rents seck. If, therefore, the cases had to be again determined, it must now be held that every gift of an annuity excludes dower. The general argument on the other side is founded on a fallacy. Our proposition is this, that if a testator gives two things, of one of which he is entire master, and of the other of which he is not entire master ; then that by giving them as one indivisible thing, he shows that the same intention is to be carried into effect as regards the object over which he has only a divided power, and as regards the object over which he has an absolute power. The will speaks immediately before the death ; and when the testator gives all his real estate, he is speaking of his fields and houses ; of the substance of the thing given ; not of his estate subject to dower ; because he is speaking at the same time of his money, notes, and the like, to which the widow has no right.

[The VICE-CHANCELLOR.—Does the widow take anything out of that which was the testator's? He had only a disposing power over that which remained after her dower. You must make out that the testator in-

(a) 1 Add. & Ell. Q. B. Rep., N. S., 682.

tended to deal with the widow's dower, not that he meant to deal with something of his own.]

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The testator must be taken to intend to speak of the *things*, the subject-matter of the will, not of what a lawyer would call his *estate* in them.

The Court took time to consider, and on the 12th June,

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The VICE-CHANCELLOR delivered judgment as follows :—

The question to be determined in this case is, whether the widow of the testator ought to be put to her election between her dower, and the benefits given to her by the will of her husband.

It is difficult, perhaps impossible, to reconcile all the authorities on this subject ; but it is impossible to examine them without perceiving that there are certain broad and clear principles which ought to form the foundation of every decision on the subject. Putting these principles into the form of propositions, they may be stated as follows :—The first is, that the doctrine of election is precisely the same, and founded on the same reasons, and governed by the same rules, when applied to dower, as when applied to any other case : there is not one doctrine of election applicable to the case of a widow claiming dower, and another doctrine of election applicable to other cases.

The second proposition is, that the doctrine of election, as applicable equally to all cases, is this : that a person who is entitled to any benefit under a will or other instrument must, if he claims that benefit, abandon every right or interest, the assertion of which would

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defeat, even partially, any of the provisions of that will or instrument; and applying this to the particular case of dower, the doctrine may be thus stated: that if the testator has by his will made such a disposition of the real estate of which he was seised, that the assertion by the widow of her right to dower would prevent that disposition having full effect, as the testator intended, then she must elect to abandon either her dower, or the benefit given to her by the will.

The third proposition is, that in no case is a person to be put to his election, unless it is clear that the provisions of the instrument under which he is entitled to a benefit, would be in some degree defeated by the assertion of his other right. And therefore, in the particular case of dower, unless it be clear and beyond reasonable doubt that the testator intended to make such a disposition of the real estate, that the assertion by the widow of her right to dower, would prevent the giving full effect to his intention, the widow shall not be put to her election. It is not enough to say that upon the whole will it is fairly to be inferred that the testator did not intend that his widow should have her dower; in order to justify the Court in putting her to her election, it must be satisfied that there is a positive intention to exclude her from dower, either expressed or clearly implied.

The fourth proposition is, that the intention to exclude the wife from her dower, must be apparent on the face of the will itself.

In support of these principles I will refer to the language of two or three eminent Judges. In *Myall v. Brain* (a), Sir *J. Leach* says, "A wife is put to her elec-

(a) 4 Madd. 119.

tion on the same principles as a stranger is. To put the wife to her election, there must be a clear intention to exclude her from dower, either express or implied." In *Birmingham v. Kirwan* (a), Lord Redesdale says (p. 449), the general rule of election is, that a person cannot accept and reject the same instrument. (His Honor then referred to portions of the judgment contained in pp. 449, 450, and 452, and to the language used by the Master of the Rolls in *French v. Davies* (b), and proceeded thus:—) These principles being, as I conceive, undeniably established, and admitting of no exception, I shall endeavour strictly to adhere to them in deciding the case before me.

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Now the dispositions made by the will are these. The testator first gives certain specific chattels to his wife, and he gives her also a certain leasehold house which was occupied by himself during his lifetime. Then he gives to trustees his freehold and leasehold estates, using these words:—"All my freehold messuages, lands, tenements, and hereditaments, and all the rest and residue of my leasehold messuages or tenements and premises;" and he adds these words, "for all my estate and interest therein." These he devises to his trustees on trust for sale, and as to the produce of the sale on the trusts after mentioned. Then he gives power to sell his copyholds; then he directs that until the sale of the freehold, copyhold, and leasehold estates, the rents and profits shall be applied in the same manner as he afterwards directs in respect of the income arising from the produce of the sale. He then gives several legacies out of his personal estate: first he gives a sum of 4000*l.* *East India Stock* in trust for his wife for her life; 2000*l.* of the same stock in trust for *Charlotte Sarah Faulkner*

(a) 2 Sch. & Lef. 444.

(b) 2 Ves. jun. pp. 576, 577.

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and her children; 1000*l.* sterling in trust for *Sarah Robinson* for life, with remainder over; and then he gives several pecuniary legacies; among others, 100*l.* to *R. Faulkner*; and then he bequeaths the residue of his personal estate, and of the produce of the sale of his real estates, upon the following trusts. He gives one-fourth to his wife absolutely, one-fourth he gives in trust for his sister *Louisa Gibson* for life, with remainder to certain nephews and nieces; one-fourth to *Mary Faulkner* for life, with remainder over to several persons, among whom are *R. Faulkner* and *Sarah Robinson*; and the remaining one-fourth he gives to *Charlotte Sarah Faulkner* and her children, in the same manner as the 2000*l.* *East India Stock*.

Now the grounds on which it is contended that the widow ought to be put to her election are the following. Firstly, it is contended that as the testator, in devising his freehold and leasehold estates, has used these words: "All my freehold," &c., it is apparent from this language that he meant to devise the whole of his freehold estates as he held and enjoyed them himself, as they were in his possession; that he intended by the use of those expressions, that his widow should be excluded from her dower; in other words, that the disposition of his property intended was such, that the claim of the widow to dower would be inconsistent with it. When this argument was addressed to Lord *Thurlow*, in *Foster v. Cook* (a), he gave this answer: "Because the testator gives all *his* property to the trustees, am I to gather from his having given all he *has*, that he has given that which he *had not*?" That answer of Lord *Thurlow* appears to me wholly to demolish the argument derived from the circumstance

(a) 3 Br. C. C. 347.

of the testator having described his lands as "all *my* lands." Indeed, when we recollect that it is only because the lands are his that the wife is entitled to dower out of them at all, it would be strange if his describing them as his, should have the effect of excluding her from her right to dower. She is entitled to dower because, and only because, the lands are his ; and the argument is, that because he describes them as his, he meant to deprive her of her dower. In the present case, when the testator devised his freehold and leasehold lands to trustees, he adds the words: "for all my estate and interest therein respectively;" and it has been justly argued, that the addition of these words shows that he intended to devise the lands as he himself had them, that is, subject to the right of his widow to dower. However, I abstain from deriving any assistance from those words in support of my view on this first point, because I am unwilling to lend any countenance to the notion, that without those words there would be any doubt. I will only add that it is clearly established that it makes no difference whether a testator devises all his lands, or all his estate and interest in his lands.

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The second ground on which it is contended that the widow in this case must be put to her election is, that the devise is in trust for sale. If it was impossible to sell lands subject to a widow's right to dower, or to sell the remaining two-thirds, after setting out by metes and bounds one-third for dower, and to sell the reversion of the third part thus set out ; then, indeed, the assertion by the widow of her right to dower would defeat the disposition made by the will for sale of the estate ; and then she would be put to her election. But, so far from any impossibility, there is, in fact, no difficulty in selling an estate subject to the widow's dower ; and

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therefore there is no ground for holding that a devise in trust for sale, is a sufficient reason for putting the widow to her election. No doubt a less amount of purchase money would be obtained; but there is no more difficulty in selling the land subject to her dower, than in selling any other reversionary interest in land, subject to some precedent partial interest. I believe there is no case in which a widow has been put to her election on the mere ground of a devise in trust for sale. In *Miall v. Brain*, Sir J. Leach, although he decided against the claim of the widow on another ground, did not so much as notice the trust for sale as a reason for his decision. In *Ellis v. Lewis (a)*, Sir J. Wigram held that a devise on trust for sale is not a ground for putting the widow to her election. In *Parker v. Downing* (the case in the 4th Law Journal, 198), the reason why the trust for sale was held to be a ground for putting the widow to her election was, that the property devised for sale was a dwelling-house, with the furniture and effects therein; and the Court considered that if the widow was to have one-third of it, a sale could not be effected of the whole, as the testator intended: but there is nothing in that case to show that a mere trust for sale, evinces an intention to exclude dower. The only authority which seems to afford any countenance to the proposition that the widow's claiming her dower would be incompatible with a trust for sale, is the language of Lord *Alvanley*, in the case of *French v. Davies (b)*, where he observed that if the widow insisted upon her dower she would obstruct the sale; but he decided in her favour because she was willing to accept satisfaction out of the purchase money. It does not appear in what sense or in what degree Lord *Alvanley* considered that

(a) 3 Hare, 310.

(b) 2 Ves. jun. 572.

the claim of dower would obstruct the sale ; it is difficult to conceive how the obstruction could be such as to make it clear that the testator could not possibly have intended the sale to be made subject to dower ; and if so, the case would not be brought within the principle of which his Lordship in the very same case expresses his approbation, *viz.* " That you are to look into the will, and see whether it is clear, plain, and incontrovertible, that the testator could not possibly give what he has given, consistently with the claim of dower." I am of opinion that the circumstance that the real estate is devised on trust for sale, is not sufficient to put the widow to her election.

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The third ground taken is this, that the testator directs that until the sale the rents and profits shall be applied in the same way as he afterwards directs with respect to the income arising from the produce of the sale. Now this I consider an argument in a circle. The language of the testator is this :—(The Vice-Chancellor referred to the clause set out in p. 43.) Now what are the rents and profits of which he is speaking ? Why, of course, the rents and profits of the land that he has devised for sale ; and in order to prove that the devise for sale is intended to be of the lands discharged of dower, the argument assumes that the rents here spoken of are the rents of the lands so discharged : this is an argument completely in a circle. Suppose a testator were to devise his freehold lands to his son, being an infant, in fee, assuredly that would not put the widow to her election. Suppose then, he were to add that, during the infancy of his son, the rents should be applied for his maintenance, would this mention of the rents put the widow to her election ? Or suppose a devise to trustees in trust for A. for life, with remainder

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over, clearly that would not put the widow to her election. Suppose then the devisee for life was a married woman, and the testator directed the rents to be applied for her separate use, would that make any difference? I confess I am quite at a loss in this case to see why the direction, that until the sale the rents are to be applied in the manner directed, should have the effect of putting the widow to her election.

The fourth ground is, that an equal fourth part of the proceeds of the sale of the real estate, and of the residuary personal estate, is given to the widow; and it is argued that, according to *Chalmers v. Storil* (a), *Dixon v. Robinson* (b), and *Roberts v. Smith* (c), that is an indication of intention to make an equal division between his widow and the other objects of his bounty, and therefore she is put to her election. Now as to these three cases, the two last were decided simply on the authority of *Chalmers v. Storil*. It is therefore material to consider the principle of *Chalmers v. Storil*, to see how far that principle commends itself to approbation, and also how far, if that case was rightly decided, it applies to the case before me. In *Chalmers v. Storil* the testator devised thus:—"I give to my dear wife and my two children, viz. my daughter A. and my son B., all my estates whatsoever, to be equally divided amongst them, whether real or personal, making no distinction in favour of the male, as it is my intent that my daughter shall have an equal share with my son of all my property, after paying the following legacies;" and then he proceeded to specify particular property as the property given by him. In that case Sir W. Grant, on the ground of the testator having described the particular items of property, and

(a) 2 Ves. & B. 222.

(b) Jac. 503.

(c) 1 Sim. & St. 513.

having especially mentioned his *English* estates, thought he discovered an intention that the wife and the two children should enjoy in equal shares all that the testator was enjoying at the time of his death. The decision in that case has been the subject of what appears to me very just criticism; and I am constrained to avow that the reasons assigned by Sir *W. Grant* for his decision are to my mind far from satisfactory. Still, however, the respect, I may say the reverence, due to any decision of Sir *W. Grant* would deter me from venturing to set up my own opinion against it, if I found it strictly applicable to the case before me. But this case is very different from *Chalmers v. Storil*, for I do not find here anything approaching to a clear indication of intention that the wife and the other persons benefited should be on an equality; neither do I find any specification of the items of the property intended to be devised. The testator does not, as in *Chalmers v. Storil*, say, "I devise my real and personal estate to my wife and the other persons equally," neither does he enumerate the items of property which he considers to be included in the devise. So far from intending equality among his wife and the other objects of his testamentary bounty, he gives them very unequal benefits in his real and personal property. To his wife, in addition to one-fourth of the proceeds of the sale of the freehold, copyhold and leasehold estate, and of the residuary personal estate, he gives his furniture, plate, linen, &c., and a specific part of his leasehold property, and a life interest in 4000*l.* *East India Stock* (no trifling portion of his personal estate). To *Charlotte Sarah Faulkner* and her children, in addition to one-fourth of the proceeds of the sale of the realty and residuary personalty, he gives 2000*l.* *East India Stock*. To *Robert Faulkner*, in addition to a reversionary interest in one-fourth of the proceeds

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of the sale of the realty and residuary personalty, he gives 100*l*. To *Sarah Robinson*, in addition to a similar reversionary interest in one-fourth of the proceeds of the sale of the realty and residuary personalty, he gives a life interest in 1000*l*. In fact, there are scarcely any two of the objects of his bounty to whom he gives equal benefits, and the extent of benefit which he gives to his wife is quite different from that which he gives to any other person or class of persons. How then can I say that he has evinced any intention of equality of distribution in the dispositions which he has made of his property? So far from it, he has expressed an intention of very great inequality. Whatever may be the respect due to *Chalmers v. Storil*, its authority must be confined to cases where the Court can come to the conclusion that the testator intended to give to his wife and the other objects of his bounty all that he himself possessed and enjoyed, in equal shares and proportions. On this point I refer again to *Ellis v. Lewis* (a), in which there was more reason than there is in this case for inferring an intention of equality. (His Honor referred to the marginal note of that case, and to portions of the judgment, particularly to those in which Sir *J. Wigram* comments upon *Chalmers v. Storil*). And here I may with propriety refer to the words of qualification which the testator in this case adds to the devise in trust for sale: "for all my estate and interest therein respectively." It appears to me that these words exclude all inference that the testator intended to devise any other estate or interest in the lands than that which he himself had, viz. an estate subject to the widow's right to dower.

The fifth ground taken was founded on certain deal-

(a) 3 Hare, 310.

ings which the testator had during his lifetime with his property. The real estate consisted of two parts, the *Hornchurch* estate and the *Shelton Court* estate. The facts on which reliance was placed in the argument with reference to the *Hornchurch* estate were, that before the date of his will the testator had agreed to let it for three years and a half, with an option to the tenant to take it for seven or fourteen years, and that after the date of his will he agreed to sell it to the lessee. As to the *Shelton Court* estate, the facts are these: that after the date of his will the testator contracted with one *Davies* that he might pull down certain buildings and build others, and that he (the testator) would grant him a lease for thirty years, with an option to purchase. Now, on these transactions it is argued, that since, by the 24th section of the Wills Act, the will giving the property is to be considered as made immediately before the death of the testator, the will in this case must be considered as made after the contracts, and that in consequence the testator must be taken to have intended to exclude his wife's dower. Now, upon this argument I will observe first, that by the 3rd section of the Wills Act it is enacted, "that it shall be lawful for every person to devise, bequeath, or dispose of all real and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, &c., and that the power hereby given shall extend (among other things) to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." The effect of the 3rd section is therefore to give power to devise after-acquired real estate. Before the passing of this Act, if a testator purported to devise after-acquired real estate, that might have put his heir to

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his election, but could not be binding upon him. The 3rd section of the Act gives power to a testator to devise after-acquired estate; but it would not follow that by a devise of all his real estate he intended to devise his after-acquired estate; and therefore the 24th section supplies what the 3rd section would not have effected, by enacting that, *quoad* the property that is to pass by a will, the will is to be considered as made immediately before the testator's death. So that if a testator gives *all his real estate*, this devise will include any property acquired after the date of the will. But am I therefore to say, if a testator makes a will the effect of which, apart from the Wills Act, would not be to exclude the wife's dower, that because the Act says that, *quoad* the property which would be included, the will is to speak at his death, therefore a different construction is to be put on the will as to the intention to exclude dower, and that it is to be read as if the execution of the will had immediately preceded his death, so as to impute to him a change of intention? I think that would be a perversion of the intention of the legislature. But even if the dealings had taken place before the date of the will, still, there being in the will no reference to the contracts, I should hesitate much before arriving at the conclusion, that a testator's dealings in his lifetime could be taken into consideration in construing his will, with reference to the question whether he intended to exclude his wife from her dower, when the will itself contains no reference to those dealings. The intention to exclude the widow's dower must be collected from the will itself; and the Court cannot, in my opinion, look at evidence of acts done in the testator's lifetime, which are not noticed in the will.

I have gone through all the arguments adverse to the

widow's claim, and on the whole, considering that to establish the case against the widow I must be able to say that I collect a clear and manifest intention to exclude her from her dower, or that I find such a disposition of his property, that the widow's claim to dower would defeat his intention clearly expressed, I am of opinion that no such case is made. If I were to declare in this case that the widow ought to be put to her election, I think I should be violating the principles which lie at the very root of the whole doctrine. The declaration will therefore be, that the widow is not put to her election, and that she is entitled to her dower. And as the acts by which the value of the property has been altered were not hers, she will take her dower according to the present value.

1852.

GIBSON

v.

GIBSON.

1852:
12th March.

Infant.
Legacy.

An infant's
legacy of small
amount paid to
the father un-
der special cir-
cumstances.

WALSH v. WALSH.

THIS was a petition to have a legacy of 100*l.* and arrears of interest, amounting to 33*l.*, belonging to a female infant of the age of ten years, paid to the father.

The petition stated that the father was a small farmer in *Ireland*, without capital or means of supporting himself and his infant daughter. It stated further, that the petitioner had a relation settled and in good circumstances in *Australia*, and that the father desired to emigrate to that country with his daughter, and it prayed payment to him of the 133*l.* to enable him to do so. The affidavit in support of the petition verified these statements, and stated further the expenses that would be incurred, showing that the 133*l.* would be scarcely more than sufficient to pay the expenses of outfit and emigration.

Mr. *Malins* in support of the petition.

The VICE-CHANCELLOR made the order, subject to the solicitors of the petitioner communicating with him personally, for the purpose of undertaking to see that the fund should be duly applied in fitting out and transferring the father and daughter to *Australia*.

BEALE v. TENNENT.

IN THE MATTER OF CUMMINS, AND OF
THE TRUSTEE ACT, 1850.

THIS was a petition by creditors in a creditor's suit, against the estate of the trustees in the cause, seeking to obtain either a vesting order, or a direction to a tenant for life under the will of the testator, to convey lands to a purchaser under the decree in the suit; the remainders over after the death of the tenant for life being contingent. The question was, whether under the circumstances which had taken place, and which will be found stated in the judgment, the Court had any jurisdiction to make any order under the Trustee Act, 1850, and if not, whether it could make an order under the 1 Will. 4, c. 47. The tenant for life under the will was seised of the legal as well as the beneficial estate; he mortgaged, and then, on paying off the mortgage, took a reconveyance.

Mr. *Shapter*, for the petition.

Mr. *J. H. Palmer* and Mr. *Roberts*, for purchasers.

Mr. *Rasch*, for parties claiming under the will of the testator.

The 11th and 12th sections of 1 Will. 4, c. 47, and *Hemming v. Archer* (a), and *Cheese v. Cheese* (b), were referred to.

(a) 7 Beav. 515; 8 Beav. 294.

(b) 15 Law J., N. S., 28.

1852:
19th March.
*Statutes,
Construction of
Trustee,
Appointment of,
to convey.*

A devise to trustees to the use of *A.* for life, with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the Court was obtained to appoint new trustees, and the heir conveyed to them. *A.* then conveyed his life estate to a mortgagee; and afterwards took a reconveyance from him. Held, that *A.* was in *by* the devise, within the 1 Will. 4, c. 47, and an order was made for him to convey to a purchaser.

1852.

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TENNENT.

The VICE-CHANCELLOR.

The first question to be considered is the effect of the dealings upon which the heir conveyed the estate to trustees. By the will, the devise was to trustees to the use of *Thomas Beale* for life, with remainders over; the devise did not operate to give a legal estate to the devisees to uses, but vested the legal estate in *T. Beale* for his life. The devisees to uses disclaimed; but this did not matter. As the devisees had no estate in them, no effect could be produced by their disclaimer, and the legal estate remained in *T. Beale* for his life; but under some misapprehension, matters seem to have been dealt with as if the legal estate descended to the heir, and as if it was necessary to appoint new trustees, and accordingly, by an order of the Court, the heir-at-law conveyed to two new trustees as devisees to uses. That conveyance had no effect; it did neither harm nor good; and if things had remained so, no doubt *T. Beale* was in, not only under, but also by the devise; and that not mediately, but directly. *Beale*, however, being the tenant for life, not only legally, but beneficially, conveyed his life estate to a mortgagee, and then the question is, what was the condition of the mortgagee; was he in *by* the devise? He was not so directly, but it is clear that he was in *under* the devise, and the question is, whether the language of the 1 Will. 4, c. 47, extends to that.* I think that in this case, having regard to the two cases

* The words of the 12th section of the 1 Will. 4, c. 47, are, "Where any lands, tenements, or hereditaments have been or shall be devised in settlement by any person or persons whose estate, under

this Act or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and *by* such devise shall be vested in any person or persons for life or other limited interest," &c.

that have been cited, the mortgagee was in *by* the devise, although other acts beyond the devise had been done to give him his estate. If the mortgagee was in *by* the devise, then when the mortgagee reconveyed to *Beale*, *Beale* was at least, as much as the mortgagee, in *by* the devise, although a second act was done by which the estate got back. I should have come to this conclusion without the authorities; but the cases cited leave the matter almost beyond doubt; and though the circumstances of those cases are different from those of the present case, I think I am following the principle of the decisions. Under the circumstances of this case, I am of opinion that I may make an order under the I Will. 4, c. 47, for *T. Beale* the tenant for life, to convey.

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 v.
 TENNENT.

1852 :

24th and 25th
May.

Pleading.
Supplemental
Bill.
Bill of Revivor.
Amendment.

A bill was filed by *A.* and his wife, alleging title in respect of the wife's estate tail. The Defendant demurred for want of equity. While the demurrer was standing for argument the wife died, and then *A.* filed a supplemental bill, alleging a disentailing deed before the date of the original bill, under which deed *A.* claimed in fee.

Held, that in this state of things the demurrer could not be heard ; that such an alteration of the record was not properly the subject of either supplemental bill or of original bill in the nature of a supplemental bill, or of a bill of revivor, nor properly of amendment ; but the original bill ought to have been left to take its course, and a new bill filed stating the real title*.

WRIGHT v. VERNON.

IN this case the bill was filed on the 25th June 1851, by *William Wright* and *Charlotte Henrietta Wright* his wife, against *Vernon* and others, in respect of an estate tail in certain real estate to which it was alleged that the Plaintiff *C. H. Wright* was entitled. The object of the bill was to restrain the Defendants from setting up the legal estate outstanding in alleged mortgagees, to prevent the trial of certain actions of ejectment brought by the Plaintiff to recover possession of the estates, and to have delivered up such deeds in the possession of the Defendants as belonged to the Plaintiff *C. H. Wright*. To this bill the Defendant *Vernon* demurred for want of equity. While this demurrer was in the paper for argument *C. H. Wright* died. The Plaintiff *W. Wright* then filed a supplemental bill, by which he alleged that by a disentailing deed, dated 9th June 1851, the estate tail of *C. H. Wright* was barred, and the lands conveyed to such uses as the said *W. Wright* and his wife should, during their joint lives, ap-

* The Reporter has thought it right to report this case, notwithstanding the 53rd section of the 15 & 16 Vict. c. 86, substituting amendment in certain cases for supplemental bill, as that section does not seem intended to meet such a case.

point, and in default to the use of *W. Wright* and his wife during their joint lives, and after the decease of either of them, living the other, to the use of the survivor in fee. No appointment was made; so that, on the death of *Mrs. Wright*, *W. Wright* became, and the bill alleged his title as, owner in fee simple. The bill prayed that it might be taken as supplemental to the original bill filed by the Plaintiff and the said *C. H. Wright* his wife, and that the Plaintiff might have the benefit of the said suit and proceedings therein, and might be at liberty to prosecute the same in the same manner as if the said *C. H. Wright* were still living. The Defendant *Vernon* answered the supplemental bill; and afterwards, on the Plaintiff's application, the demurrer to the original bill was restored to the paper, and now came on for argument.

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The *Vice-Chancellor*, on the above facts being stated, intimated that the difficulty was, whether the suit was in such a state that he could hear the demurrer argued; and the arguments turned therefore entirely on the effect of the course of pleading taken.

Mr. Malins and *Mr. Smythe*, for the Plaintiff, were heard to argue that filing a supplemental bill was the proper course in such a case to restore the suit to existence.

Mr. Stuart, *Mr. Campbell*, and *Mr. Bagshawe*, *contrà*.

THE VICE-CHANCELLOR:

I think that the Plaintiff has altogether mistaken his course. The original bill was a bill representing in substance, that *Mrs. Wright* was entitled to certain real estate as tenant in tail. The bill is by her and her husband, on the foundation of that title, seeking to

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restrain the setting up of certain outstanding legal estates, so as to prevent the fair trial of the title of Mrs. *Wright* in some actions of ejectment, and it prayed also the delivery to the Plaintiff of title deeds, viz. such deeds as belonged to the Plaintiff Mrs. *Wright*. The bill was entirely founded on the assumption of Mrs. *Wright* being the rightful owner, and as such entitled to have her title established at law. Mr. *Wright* was no further Plaintiff than as the husband of Mrs. *Wright* entitled, *jure mariti*, not only to join in the suit, but as having an estate in right of his wife. To that bill a demurrer was put in by one of the Defendants for want of equity. In that state of things Mrs. *Wright* died. Now suppose that there were no other facts than those stated in the original bill, and that the title was as then represented, and suppose no alteration had taken place between the filing of the bill and the death of Mrs. *Wright*, what would be the effect of Mrs. *Wright's* death? by it her husband's right entirely ceased. He had no longer any interest on which he could maintain the actions; they had abated and he could not go on with them; he had no interest but as her husband in her right as tenant in tail, and that having ceased, he could not recover a judgment. By the wife's death the estate had gone to the issue in tail if there were any, or, if there were none, then it had gone to the next in remainder; and both his estate and his wife's being gone, he could recover no judgment in respect of either. That, however, is not material except for this, that the result is that he could have no decree in the suit, for it would be a decree to restrain the setting up of legal estates in an action in which he could recover no verdict. He could not revive the suit, because the interest which had ceased in the wife had not come to him. He could not file a supplemental bill,

nor an original bill in the nature of a supplemental bill, or of a bill of revivor, to have the benefit of the original suit, because the right to relief in that suit had ceased. If the suit had not abated, and if before the filing of the bill there had been a disentailing deed executed, vesting in the husband and wife the estates which were in fact vested in them, he might have amended, supposing the suit to be in a state for amendment; but the bill became incapable of amendment by the abatement. Could, then, a supplemental bill be filed for introducing the allegation of the disentailing? Suppose Mr. and Mrs. *Wright* having filed their original bill in her right as tenant in tail, that, after that, the disentailing deed had been executed. No doubt then a supplemental bill might be filed for bringing forward that new fact, showing the creation of a new title, and they might have then continued the suit by a supplemental bill; for a supplemental bill, strictly so called, is for the purpose of bringing before the Court material facts which have occurred since the filing of the bill. Now suppose that after filing such a bill, Mrs. *Wright* had died, Mrs. *Wright's* interest would have ceased, and the husband would remain solely entitled, and by a supplemental bill stating the death of his wife, and showing how the whole estate became vested in him, he might continue the suit. But the bill being filed as it was, stating the title of Mrs. *Wright* as tenant in tail, could the Plaintiff thus have filed a supplemental bill for the purpose of stating a disentailing deed executed before the filing of the original bill? I apprehend not. For then there would be an original bill asserting that the Plaintiff sued in right of Mrs. *Wright* as tenant in tail, and the supplemental case in that suit would show that there was no right in the Plaintiff to file the original suit. The anomaly of the existence of two such suits would be so great, that I

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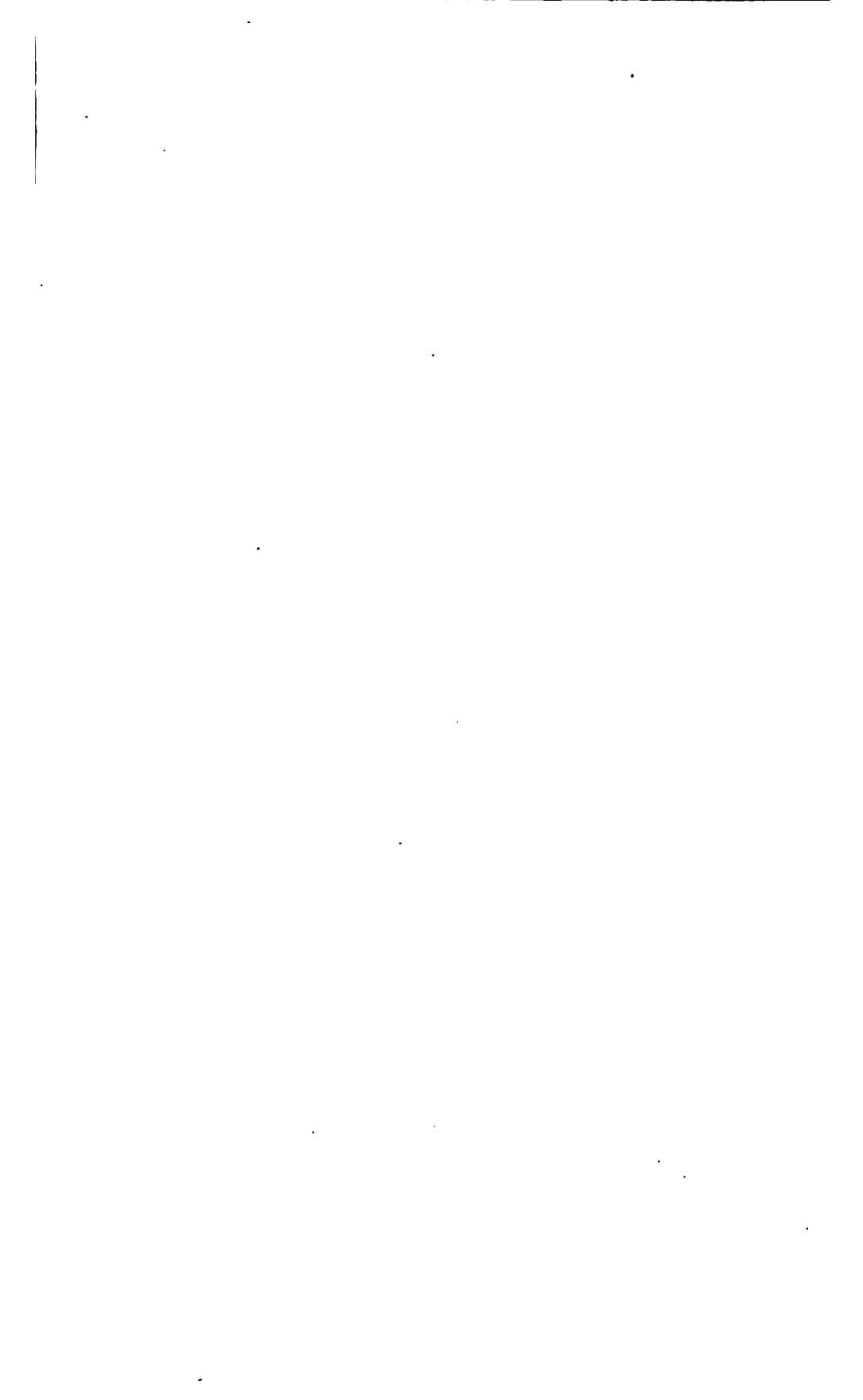
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do not think such a supplemental bill could be sustained. It is true, that where a suit is at such a stage, that amendment is impossible, as when the cause is at issue, in such a case sometimes a supplemental bill is allowed, to bring before the Court facts which might have been alleged in the original bill, but then they must be facts consistent with sustaining the original bill. But I think a supplemental bill could not be the course in this case, for doing what might have been done at the outset by amendment. For what has been done is this? The original bill is clearly abated by the death of Mrs. *Wright*; it is incapable of amendment until restored to existence. Now Mr. *Wright* has filed not an original bill, nor an original bill in the nature of a supplemental bill, but a bill strictly supplemental, stating the filing of the original bill, and parts of its allegations then stating the fact which took place before the original bill was filed, viz. the execution of the disentailing deed, and praying; (his Honor read the prayer of the supplemental bill, referred to in p. 69). My opinion as to what the Plaintiff Mr. *Wright* should have done on the death of his wife is this:— He should have left the old bill to take its course, and should have filed an original bill stating the real title. Being of opinion that that would have been the proper course, that a wrong course has been taken, that the filing of the supplemental bill has not revived the original suit which still remains abated, I cannot now hear the demurrer argued. There is much difficulty as to the course of the Defendant in that suit. But all that I can now do is to order the matter to be struck out of the paper. As to the costs, I see no reason for allowing costs as if the demurrer had been allowed. I can form no opinion whether it would be allowed or overruled. But as it appears to me that the Plaintiff has miscarried in having the demurrer set down, I shall direct in striking it out, that the Plaintiff shall pay the costs of the day.



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persons claiming under an appointment made by the will of Mrs. *Morrison*, and others the persons claiming in default of the validity of the appointment.

It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, &c. ; and as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income.

The wife died many years before her husband. By her will she said :—" I do, by virtue of the power and authority reserved to me in and by the deed of settlement, made &c., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3,000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons ; she disposed also of her jewels, china, and other things ; and her will concluded as follows :—
" And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security during the respective lives of my said nieces ; and the dividends or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead equally, share and share alike ; but the issue of any deceased niece is only to be entitled to the share which his or their mother

The annexed pedigree shows the state of the family of the testatrix.

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On the marriage of Mrs. *Morrison* with *Archibald Morrison*, a settlement dated the 5th of May 1823, was made between the said *Archibald Morrison* of the first part, and *Sarah Morrison* his wife by her then name and description of *Sarah Harvey* spinster of the second part, and the Plaintiff and *John Stracey*, Esq., a Defendant in the suit, of the third part. After reciting (amongst other things) that the said *Sarah Morrison* was possessed of the sum of 20,000*l.* *South Sea An-*

would have had if living at the decease of the said Caroline Onley ; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same, and, in default thereof, then unto the next of kin in blood of my said niece according to the Statute of Distribution of Intestates' Personal Estates.'

Held, first, that the will was an execution of all the powers ; that is, of the power to appoint each portion of property comprised in the settlement.

Secondly, that the appointment in favour of the daughters of *John Harvey* was not void *ab initio*, because it might comprise persons not living at the death of the testatrix and within the eighth degree ; nor did it become void *in toto*, because it did in fact, at the time of distribution, include such persons ; but that it was good *pro tanto*.

Thirdly, that the attempted limitation to the husbands of the nieces was bad, as they were strangers ; and the limitations to their children, grandchildren, or other relations in blood, was void for remoteness.

Fourthly, that the attempt to cut down the estate given to the nieces in the first instance, failing, the attempted remainders over did not go as unappointed, to the next of kin, but failed wholly, and left absolute interests subsisting in the nieces.

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nuities standing in her name in the books of the *South Sea Company*, and the sum of 7,000*l.* 3*l.* per Cent. Reduced Bank Annuities standing in her name in the books of the Governor and Company of the Bank of *England*, and the sum of 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities also standing in her name as in the said last-mentioned books, and also of thirty shares or securities of 50*l.* each in the *Westminster Gas Light Company* standing in her name in the books of the said Company; and that the said *Sarah Morrison* was possessed of or entitled to 54,000 francs monies, or to stock in the *French* funds then standing in her name; and that upon the treaty for the said intended marriage between the said *Archibald Morrison* and *Sarah* his wife it was agreed that she should transfer the said sums of 20,000*l.* *South Sea* Annuities, 7,000*l.* 3*l.* per Cent. Reduced Annuities, and 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities, and the said thirty shares or securities in the *Westminster Gas Light Company* into the names of the Plaintiff and the said *John Stracey*; and that they or the survivor of them, their or his executors, administrators, or assigns, should stand possessed thereof and interested therein upon and for the trusts, intents, and purposes, and subject to the powers, provisions, agreements, and declarations thereafter expressed and declared. And reciting that, in pursuance and part performance of the said agreement, the said *Sarah Morrison* had duly transferred the said sum of 20,000*l.* *South Sea* Annuities into the names of the Plaintiff and the Defendant *John Stracey*, and had also transferred the said sum of 7,000*l.* 3*l.* per Cent. Reduced Bank Annuities, and 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities into the names of the Plaintiff and the said Defendant *John Stracey*, and had also transferred the said thirty shares or securities in the *Westminster*

Gas Light Company into the names of the Plaintiff and the said *John Stracey*; It was by the said indenture (amongst other things) witnessed and declared that the Plaintiff and the said *John Stracey*, their executors, administrators, and assigns should stand and be possessed of and interested in the said sums of 20,000*l.* *South Sea* Annuities, 7,000*l.* 3*l.* per Cent. Reduced Annuities, 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities, and the said thirty shares in the *Westminster* Gas Light Company, and the dividends and annual produce thereof respectively, in trust for the said *Sarah Morrison*, her executors, administrators, and assigns, until the solemnization of the intended marriage; and from and after the solemnization thereof upon and for the trusts and purposes and with and under and subject to the powers, provisions, agreements, and directions therein-after expressed and contained concerning the same, (that was to say) upon trusts therein declared as to the investment of the sums of 20,000*l.* *South Sea* Annuities, 7,000*l.* 3*l.* per Cent. Reduced Bank Annuities, and 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities, and the said thirty shares or securities in the *Westminster* Gas Light Company, and upon trust to be possessed of and interested in the said several sums of 20,000*l.* *South Sea* Annuities, 7,000*l.* 3*l.* per Cent. Reduced Bank Annuities, and 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities, and of and in the said thirty shares or securities in the *Westminster* Gas Light Company, and the monies to arise or be produced by or from any sale, transfer, or disposition of the same (under the trust, for investment), and the stocks, funds, and securities in or upon which the same should or might be laid out or invested, and the dividends, interest, and annual produce thereof respectively, upon and for the trusts and purposes, and with, under, and subject to the powers, provisoes, agree-

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nuities standing in her name in the books of the *South Sea* Company, and the sum of 7,000*l.* 3*l.* per Cent. Reduced Bank Annuities standing in her name in the books of the Governor and Company of the Bank of *England*, and the sum of 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities also standing in her name as in the said last-mentioned books, and also of thirty shares or securities of 50*l.* each in the *Westminster* Gas Light Company standing in her name in the books of the said Company; and that the said *Sarah Morrison* was possessed of or entitled to 54,000 francs monies, or to stock in the *French* funds then standing in her name; and that upon the treaty for the said intended marriage between the said *Archibald Morrison* and *Sarah* his wife it was agreed that she should transfer the said sums of 20,000*l.* *South Sea* Annuities, 7,000*l.* 3*l.* per Cent. Reduced Annuities, and 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities, and the said thirty shares or securities in the *Westminster* Gas Light Company into the names of the Plaintiff and the said *John Stracey*; and that they or the survivor of them, their or his executors, administrators, or assigns, should stand possessed thereof and interested therein upon and for the trusts, intents, and purposes, and subject to the powers, provisions, agreements, and declarations thereafter expressed and declared. And reciting that, in pursuance and part performance of the said agreement, the said *Sarah Morrison* had duly transferred the said sum of 20,000*l.* *South Sea* Annuities into the names of the Plaintiff and the Defendant *John Stracey*, and had also transferred the said sum of 7,000*l.* 3*l.* per Cent. Reduced Bank Annuities, and 3,150*l.* New 4*l.* per Cent. Reduced Bank Annuities into the names of the Plaintiff and the said Defendant *John Stracey*, and had also transferred the said thirty shares or securities in the *Westminster*

stocks, funds, and securities, unto the said *Sarah Harvey*, her executors, administrators, or assigns, for her or their proper use and benefit. *But if the said Sarah Harvey should die in the lifetime of the said Archibald Morrison then should immediately after the decease of the said Sarah Harvey, by and out of the trust monies, stocks, funds, and securities, levy and raise the sum of 3,000l. of lawful money of Great Britain, and pay and apply the same to such person or persons, and for such intents and purposes as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses, direct or appoint. And in default of such direction and appointment, or so far as any such direction or appointment should not extend, in trust for such person or persons as under the Statute for the Distribution of the Effects of Intestates would at the decease of the said Sarah Harvey have become entitled thereto as her next of kin in case the said Archibald Morrison had died in her lifetime, and she had died possessed thereof, his widow and intestate ; And should, from and after the decease of the said Sarah Harvey, so dying during the life of the said Archibald Morrison as aforesaid, pay the dividends, interest, and annual produce of all the surplus and residue which should remain of the said trust monies, stocks, funds, and securities, after raising thereout the said sum of 3,000l. as aforesaid, or permit the same to be received by the said Archibald Morrison and his assigns, during his life, and should, from and after the decease of the said Archibald Morrison, in case of his surviving the said Sarah Harvey as aforesaid, stand and be possessed of*

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ments and declarations thereafter expressed concerning the same, (that was to say) upon trust that the said Plaintiff and *John Stracey*, and the survivor of them, and the executors, administrators, or assigns of such survivor, should, during the joint lives of the said *Archibald Morrison* and *Sarah Harvey*, by and out of the dividends, interest, and annual produce of the said trust monies, stocks, funds, and securities, levy and raise the *yearly sum of 500L.*, and pay and apply the same by equal quarterly payments to such person or persons, and for such intents and purposes as the said *Sarah Harvey* should, from time to time, notwithstanding her coverture, by any writing or writings under her hand, but not so as to dispose of or affect the same or any part thereof by any sale, mortgage, or charge, or otherwise in the way of anticipation, direct or appoint. And in default of such direction or appointment into her own hands for her sole and separate use and benefit, independently and exclusively of the said *Archibald Morrison*, and without being in anywise subject to his debts, control, interference, or engagements (with the usual receipt clause), and subject and without prejudice to the payment of the said yearly sum of 500L., should, during the joint lives of the said *Archibald Morrison* and *Sarah Harvey*, pay the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities to, or allow the same to be received by, the said *Archibald Morrison* and *Sarah Harvey* for their joint use and benefit; and the joint receipts of the said *Archibald Morrison* and *Sarah Harvey*, and such receipts only, to be sufficient discharges for the same; And should, immediately after the decease of the said *Archibald Morrison*, in case he should die in the lifetime of the said *Sarah Harvey*, pay, transfer, or assign all and singular the said trust monies,

and the said thirty shares or securities in the said *Westminster* Gas Light Company, and the monies to arise from the sale, transfer, or disposition of the same respectively, and the stocks, funds, and securities in or upon which the same respectively should or might be laid out or invested, and the dividends, interest, and annual produce thereof, respectively, but not so as to make more than one annual sum of 500*l.* payable for the separate use of the said *Sarah Harvey* during the joint lives of the said *Archibald Morrison* and *Sarah Harvey*, or more than one sum of 3000*l.* raiseable after the decease of the said *Sarah Harvey* in case of her dying during the life of the said *Archibald Morrison*. And it was by the said indenture further witnessed that for the consideration therein mentioned she, the said *Sarah Harvey*, with the privity and approbation of the said *Archibald Morrison*, did bargain, sell, assign, transfer, and set over unto the said Sir *Robert John Harvey* and *John Stracey*, their executors, administrators, and assigns, all and singular the plate, linen, china, glass, books, pictures, and household goods and furniture which she, the said *Sarah Harvey*, was then possessed of or entitled to, and all the right, title, interest, property, possibility, claim, and demand whatsoever, of her the said *Sarah Harvey*, of, in, or to the said premises, and every part thereof; To hold all and singular the premises last thereinbefore assigned unto the said Sir *Robert John Harvey* and *John Stracey*, their executors, administrators, and assigns, in trust for the said *Sarah Harvey*, her executors, administrators, and assigns, in the mean time and until the said intended marriage should be had and solemnized, and from and after the solemnization thereof, in trust to permit and suffer the same to be used and enjoyed by the said *Archibald Morrison* and *Sarah Harvey* jointly during their joint lives, and from

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and after the decease of the said *Archibald Morrison*, in case he should die in the lifetime of the said *Sarah Harvey*, in trust for her, the said *Sarah Harvey*, her executors, administrators, and assigns, and to deliver the same to her or them accordingly. But if the said *Sarah Harvey* should die in the lifetime of the said *Archibald Morrison*, then to suffer the same to be used and enjoyed by the said *Archibald Morrison* during his life, and after his decease to stand possessed of the same in trust for such person or persons and for such intents and purposes as the said *Sarah Harvey* should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature or purporting to be a will or codicil to be signed and published by her in the presence of, and to be attested by two or more credible witnesses, direct or appoint. And in default of such direction or appointment, or so far as any such direction or appointment should not extend, in trust for such person or persons as under the Statute for the Distribution of the Effects of Intestates would, at the decease of the said *Sarah Harvey*, have become entitled thereto, as her next of kin, in case the said *Archibald Morrison* had died in her lifetime, and she had died possessed thereof, his widow and intestate. And it was by the said indenture further witnessed that in pursuance of the said agreements, and in consideration of the said intended marriage, the said *Archibald Morrison*, for himself, his heirs, executors, and administrators, did thereby covenant, promise, and agree to and with the said Sir *Robert John Harvey* and *John Stracey*, their executors, administrators, and assigns, that in case the said intended marriage should take effect, he the said *Archibald Morrison*, his executors, and administrators, would permit and suffer the said *S. Harvey* from time to time, and at all times thereafter, notwithstanding

the said intended coverture, to have, use, wear, and enjoy to and for her sole and separate use, and as her own separate property, and either in her lifetime from hand to hand or otherwise, or by her last will and testament in writing, or any codicil or codicils thereto, or any writing or writings in the nature or purporting to be a will or codicil to be signed by her own hand, to sell, give away, or dispose of to any person or persons, or for any intents or purposes whatsoever the two shares or tickets of which the said Sarah Harvey was possessed in the said public libraries or institutions in Norwich as aforesaid, the ticket of which the said Sarah Harvey was possessed as aforesaid of admission to the Theatre Royal of Norwich, and all the jewels, pearls, watches, trinkets, and other personal ornaments of which the said Sarah Harvey was then possessed. And also all the money and goods, chattels, or effects whatsoever which she the said Sarah Harvey might save or purchase out of the income thereby settled for her separate use, or which might arise from the sale or disposition of any of her separate chattels or effects, and all other shares or tickets in any of the public libraries of Norwich, or tickets of admission to the Theatre Royal at Norwich, or jewels and other personal ornaments, or other property or effects whatsoever of a like nature, which she, the said Sarah Harvey, might save or purchase out of her separate income during her said intended coverture.

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Mrs. Morrison duly made her will on the 23rd May, 1825, in the following words :—

I, Sarah, the wife of Archibald Morrison, of Eaton in the county of the city of Norwich, Esq., do by virtue of the power and authority reserved to me in and by the deed of settlement made on my marriage, and bearing

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*date 5th of May, 1823, hereby make and publish and declare this to be my last will and testament in manner and form following: that is to say, Whereas, by virtue of the said settlement, I am entitled to dispose of the sum of 3000*l.* by will immediately on my decease, now I do hereby direct and appoint the same to be paid to the persons, and for the purposes hereinafter mentioned, and I give and bequeath the same as follows, that is to say, the sum of 500*l.* to my nephew Sir Robert John Harvey; the sum of 100*l.* to the Rev. Charles Day who married my late niece Mary Ann Harvey; the sum of 100*l.* to Eliza Lohr, the wife of Mr. Lewis Lohr; the sum of 100*l.* to Mrs. Adams, sister to my husband; the sum of 50*l.* to Hannah Kerrison, the widow of the late Thomas Allday Kerrison; the sum of 19 guineas to Mr. and Mrs. Atkins, now of Doughty Hospital in Norwich, or to the survivor of them. And the sum of 20*l.* to be divided amongst the female servants living with me at my decease, including Mary Sewell, hereinafter mentioned. Also I direct and appoint that the sum of 21*l.* be paid to the treasurer of the Benevolent Society for Decayed Tradesmen in Norwich; the sum of 20*l.* to the treasurer of the Norfolk and Norwich Hospital; the sum of 20*l.* to the treasurer of the Society for liberating Persons confined for small Debts in Norwich, to be by him applied in obtaining the release of any prisoner confined for a small debt in Norwich gaol, and to afford him some assistance upon his discharge, as such treasurer may deem most proper; and the sum of 20*l.* to be distributed by my executors amongst the poor of the parish where I may happen to be resident at the time of my death; all which said legacies I desire shall be paid to the said legatees and treasurers respectively within three calendar months next after my decease. And I direct that the duty on the*

legacy to the said *Eliza Lohr* should be paid in addition to her said legacy. And I do desire that in case of the death of any of the said legatees in my lifetime, by which means the said legacies would become lapsed, then that such lapsed legacy or legacies, provided the same do not exceed the sum of 100*l.*, shall be paid to my said husband for his own absolute use and disposal. And I do further direct and appoint that my executors hereinafter named do and shall, out of the said sum of 3000*l.*, raise a competent sum of money to produce the annual sum of 25*l.*, and place the same in government or real security during the natural life of my servant *Mary Sewell*, whether she shall be in my service or not at the time of my decease, and do pay the said annuity to the said *Mary Sewell* during her life as the same shall from time to time become due for her own use. And from and after the decease of the said *Mary Sewell*, then I desire that the sum of money so invested for securing the said annuity shall become part of the residue of my personal estate. And I direct and appoint that all the remainder of the said sum of 3000*l.*, together with the said sum of money set apart for securing the annuity to the said *Mary Sewell*, in case she shall die in the lifetime of my said husband; and also any sum of money which I may save from and out of the annual sum of 500*l.* reserved to me by my said settlement in the nature of pin money, if the same shall exceed 1000*l.*, shall be severally continued out at interest by my said executors or the survivor of them during the life of my said husband, and that he shall be at liberty to receive the interest or dividends thereof as the same shall arise, during his life for his own use, and from and after his decease, then that the said several last-mentioned sums shall become part of the residue of my personal estate. But in case such savings shall not exceed 1000*l.*, then I

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give all such savings to my said husband absolutely. *Item*, I do hereby nominate, constitute, and appoint my said husband *Archibald Morrison* and my said nephew *Sir Robert John Harvey* to be executors of this my last will and testament. *Item*, I give and bequeath unto my said husband for his life all the benefits and advantages to be derived from my shares of the *Norwich* public library and the *Norwich* Literary Institution, and my ticket of admission to the Theatre Royal of *Norwich*, and also the use of my books during his life; and after the death of my husband, I give my share in the public library to my niece *Judith* the wife of *Charles Turner*, if then resident in *Norwich*, if not, then to my nephew *Roger Kerrison Harvey*, and my shares in the *Norwich* Literary Institution to the Rev. *Charles Day*; my ticket of admission to the *Norwich* Theatre to my niece *Sarah* the wife of *William Herring*; and my books to be equally divided amongst my nephew *Roger Kerrison Harvey*, my great nephew *Charles Day*, and my great niece *Louisa Day*. *Item*, I give to the said *Sarah Herring* the diamond ring presented to me by her husband, and to *Lady Harvey*, the wife of the said *Sir Robert John Harvey*, all my other diamonds, whether purchased before my marriage or since. To the said *Judith Turner*, all the pearls which I possessed before my marriage. To my niece *Emma Squire* my blue enamelled watch set with pearls. To my great niece *Louisa Day* all my laces and all my personal ornaments not otherwise disposed of by this my will. And to my own personal female servant living with me at my decease all my linen and common gowns; and from and after the decease of my said husband I give to my said nephew *Sir Robert John Harvey* my silver epergne and my dear father's portrait, and all the family miniatures, to continue in his family in the nature of heir-looms. To my niece *Emma*

Squire my small silver cream-pail and ladle, and my silver muffineer. To my nephew *George Harvey* and his wife, my large and small silver candlesticks possessed by me before my marriage. To my niece *Judith Turner* my silver caddy, my silver waiter, and my plated waiters, and also my India cabinet, my china jars, and all my ornamental china possessed before my marriage. To the said *Charles Day* the younger, and his sister *Louisa Day*, my silver spoons, knives, forks, and fish trowel, whether belonging to me before marriage or purchased since, to be equally divided between them and to the survivor; but should they both die in the lifetime of the said husband, then I give such last-mentioned articles to be equally divided amongst the eldest daughters of the said Sir *Robert John Harvey*, *George Harvey* and *Sarah Herring*. And I give, after the death of my said husband, my plated dishes, and covers, and sauce-boats, salt cellars, and cruets, and my tea equipage, all belonging to me before marriage to any of my married nephews or nieces who may not be possessed of such respective articles, or to the first nephew or niece who may marry after the decease of the survivor of my husband and myself. And my glass chiffonnier bookcase to the said Sir *Robert John Harvey* and Lady *Harvey*; and after the decease of the survivor of them, to all my nephews in succession as they shall be in priority of age. And my pianoforte to the said *Louisa Day*, if she be not provided with one as good at the death of my said husband; and if she is, then to such great-niece who plays on that instrument, who has not one for her own use. *Item*, I give and bequeath to my said nieces, *Fanny Bellman*, *Emma Squire*, *Sarah Herring*, and *Judith Turner*, the sum of 200*l.* each, to be severally paid them within six months after the decease of my said husband or of my death, if I should survive him. And I give and bequeath unto my said husband all the rest of

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my household furniture, household linen, common china, and all other articles for domestic and culinary purposes. *And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother, John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savill Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security during the respective lives of my said nieces, and the dividends or interest on each share as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead*

*equally, share and share alike ; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley ; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form as she may, by her last will and testament duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same ; and in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates. And I do further direct that, in case any of my said legatees shall be minor or minors at the time they may be respectively entitled to the several legacies, then that my surviving executor, his executors or administrators, shall continue the respective legacies, which they shall be entitled to under this my will, out at interest on government or real security, until they shall attain their respective ages of twenty-one years. And that my said executor, his executors or administrators, do and shall apply the dividends or interest of the shares of the said *Charles Day* and *Louisa Day* for their benefit during such minority ; and that the interest or dividends of the shares of my other legatees shall be suffered to accumulate by way of compound interest until they respectively attain the said age of twenty-one years, and shall be paid to them at that time in addition to and together with their original shares. And I do hereby expressly declare that my ex-*

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cluding my nephews from participating in the residue of my personal estate has not arisen from any want of regard or affection for them, which I sincerely feel, but from considering them amply provided for by other means.

And she made several codicils, of which the 2nd, 3rd, and 7th were as follow:—

The 2nd codicil.—It is my desire that a sum necessary to produce 12*l. per annum* be vested in government securities, to be given half-yearly to since deceased since deceased, and to her sister *Maria Atkins*, now resident at *Hackney*, formerly of *Norwich*, the daughters of the late *Thomas Atkins*, cabinet-maker and chair-maker, and of *Mary* his wife, my much-loved and respected nurse, with the benefit of survivorship. Should there not be sufficient principal money out of the 3000*l.* allotted for my payment of legacies, after the payment of my other bequests made in my will, I desire all there is to spare may be vested as aforesaid, for the purpose of producing an annuity for their joint use and benefit, not omitting the benefit of survivorship. *Mary Atkins* being dead I wish the money to be invested for *Maria Atkins*, her sister, sufficient to produce 12*l. per annum*.—*Sarah Morrison, Eaton Hall, January 30, 1826.*

The 3rd codicil.—Should they both die in the lifetime of my dear husband, of course the annuity to revert to him for his life, and after his death, the principal to revert to Sir *Robert John Harvey* of *Monshold House*, though differently specified in my will.—*Sarah Morrison, Eaton Hall, January 30, 1826.*

The 7th codicil.—Upon glancing over my will I do not

see I have mentioned them, on account of my dear father having made them an allotment of part of my property. I therefore hope they will accept as a testimony of my remembrance the trifling legacy of 25*l.* each after the death of my beloved husband, wherewith to purchase some memento of their now sick and affectionate sister.—*S. Morrison*. I would have left it at my decease, but am limited in my means. I am not well—my hand shakes, Dec. 1, 1826.—*Sarah Morrison, Eaton Hall*.—God bless my dear brothers.

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Mrs. Morrison died on the 15th of February, 1827.

The will and codicils were proved by *Archibald Morrison* and the Plaintiff. *Archibald Morrison* died on the 1st May 1848. The other material facts relating to the state of the family appear by the pedigree.

The bill was filed in April 1849, for carrying into execution the trusts of *Mrs. Morrison's* will. Under several decrees the Master made his report on the 19th June 1851, and he thereby found the settlement and will already set out, and he found, as to the state of the family, the death of *Mrs. Morrison* as above stated on the 15th of February 1827; and he found that *Archibald Morrison*, the husband of *Sarah Morrison*, died on the 1st of May 1848; that *Caroline Mary Savill Onley* died on the 29th of October 1845; that the testatrix's father *Robert Harvey*, on the 10th of February 1752, intermarried with *Judith Onley*, daughter of Captain *Onley*; and that the said *Judith Harvey*, wife of the said *Robert Harvey*, died in the year 1810; that the said *Robert Harvey* died in the year 1816, and had issue by that marriage five sons and three daughters, and never had any other children or child, namely, *Robert Harvey*, who was born the 8th of February 1753, and

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on the 30th day of August 1781, intermarried with *Ann Ives*, and died in the month of January 1820, without ever having had any issue. *Judith Lydia Harvey*, who was born on the 31st of March 1754, and intermarried on the 19th of April 1777 with *William Peete*, and died in or about the year 1787, without ever having had any issue. *John Harvey*, who was born on the 5th of May 1755, and married *Fanny Kerrison* on the 27th of December 1782, and died on the 9th of February 1842. *Charles Harvey*, who was born on the 20th of December 1756, and married first on the 30th of March 1783, *Sarah Haynes*, who died on the 12th of March 1805, and he afterwards, on the 27th of November 1817, married *Charlotte Haynes*, and died on the 31st of August 1843, leaving issue by his first wife living at his decease as thereafter mentioned, but without having ever had any other issue than (as thereafter mentioned) *Elizabeth Harvey*, who was born on the 15th of August 1758, and died an infant at the age of one year or thereabouts. *William Harvey*, who was baptized on the 8th of March 1761, and died unmarried. *Samuel Harvey*, who was baptized on the 30th of May 1762, and died unmarried. *Sarah Harvey* the testatrix, who was born in the month of March 1767, and married the said *Archibald Morrison* on the 15th of May 1823; and he found that *John Harvey*, one of the above-named sons of the said *Robert Harvey* and *Judith* his wife had eleven daughters and no more, viz. *Fanny Harvey*, who was born on the 26th of February 1784, and on the 26th of November 1811 intermarried with the Rev. *Edmund Bellman*, who departed this life on the 26th of December 1843; *Marianne Harvey*, who was born on the 10th of May 1786, and married the Rev. *Charles Day* at *Gretna*, on the 15th of May 1806, and at the parish church of *St. Giles*, in the city of *Norwich*, on the 10th of June 1806, and who died on the 18th of

March 1812, leaving two children, viz. *Charles Day* and *Louisa Day* her surviving; *Julia Harvey*, who was born on the 30th of August 1738, and died unmarried; *Emma Harvey*, who was born on the 15th of August 1790, and married *Richard Day*, esquire, on the 26th of November 1811, both living (at the date of the report); *Caroline Harvey*, who was born on the 2nd of May 1792, and died an infant, under the age of one year; *Louisa Harvey*, who was born on the 26th of April 1795, died on the 15th of October 1810, an infant under the age of fifteen years and unmarried; *Caroline Mary Harvey*, who was born on the 11th of June 1797, and married *Onley Savill Onley*, esquire, then *Onley Harvey*, esquire, on the 16th of April 1818, and died on the 29th day of October 1845, leaving issue living at her decease as thereinafter mentioned, and without having had any other children or child than, as thereinafter mentioned (and the Master found that she was the person in the pleadings of the cause called *Caroline Savill Onley*, and that *Onley Savill Onley* was then living, and a Defendant); *Harriett Harvey*, who was born on the 16th of August 1803, and married the Defendant *Thomas Blakeston* on the 9th of August 1827, and he the said *Thomas Blakeston* was then living, and a Defendant in the suit; *Rosa Harvey*, who was born on the 18th of October 1805, and married the Defendant *John Ranking*, and he the said *John Ranking* was then living, and a Defendant in the suit; *Augusta Harvey*, who was born on the 18th of July 1807, and married *Harry Dent Goring*, esquire, on the 2nd of August 1827, which said marriage was dissolved by Act of Parliament, in the 4th and 5th years of the Queen, cap. 55, and she the said *Augusta Harvey*, formerly *Augusta Goring*, afterwards, on the 4th of December 1846, intermarried with the Defendant *John Trelawney*, and he the said *John Tre-*

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lawney was then living, and a Defendant in the suit, and *Charlotte Harvey*, who was born on the 20th of March 1809, and married the Defendant *Robert Blake* (who has since taken the name of *Humfrey* in addition to the name of *Blake* by the special licence and authority of the Queen), and the said *Robert Blake Humfrey* was then living and a Defendant in the suit. And he found that the said *Marianne Day*, *Julia Harvey*, *Caroline Harvey*, *Louisa Harvey*, and *Caroline Mary Savill Onley*, five of the nieces of the said testatrix *Sarah Morrison* deceased, respectively died in the lifetime of the said *Archibald Morrison*, and that the said *Fanny Bellman*, *Emma Squire*, *Harriett Blakeston*, *Rosa Ranking*, *Augusta Trelawney*, and *Charlotte Blake Humfrey*, the remaining six nieces of the said testatrix *Sarah Morrison*, deceased, were all of them then living and Defendants to the suit. And he found that the said *Charles Day* was born on the 6th of November 1811, and was then living, and a Defendant in the suit, and that the said *Louisa Day* was born on the 5th of January 1810, and that she, on the 23rd day of November 1831, intermarried with the Rev. *Henry William Blake*, and afterwards, on the 11th day of March 1843, died in the lifetime of the said *Archibald Morrison*, leaving one child and no more, viz. *Henry Blake*, one of the Defendants to the suit, who was born on the 4th of January 1843; and he found that the said *Caroline Mary Savill Onley* had issue five children, that is to say, *Caroline Savill Harvey*, who was born on the 21st of May 1820, and married the Defendant the Rev. *Henry Philip Marsham*, on the 19th of September 1843, *Louisa Harvey Savill Onley*, who was baptized on the 27th of April 1824, and married the Defendant the Rev. *Thomas Garden Carter* on the 22nd of June 1848, and died on the 12th of December 1849; the Defendant *Charles Savill Onley*,

who was baptized on the 4th of August 1827; the Defendant *Mary Savill Onley*, who was baptized on the 24th of February 1839; and *Arthur Onley*, who was baptized the 2nd of January 1835. And he found that the said *Charles Harvey*, who afterwards took the name of *Charles Savill Onley*, by the special licence and authority of his late Majesty, King *George* the Fourth, had only two daughters living at the date of the will, and at the death of the said *Sarah Morrison*, viz. *Sarah Harvey* and the Defendant *Judith Harvey*; and he found that the said *Sarah Harvey* was born on the 16th of August 1785, and married *William Herring*, then deceased, on the 23rd of April 1812, and died in the lifetime of the said *Archibald Morrison*, in the month of January 1828, leaving issue five children and no more, that is to say, *William Harvey Herring*, who was born on the 28th of February 1813; the Defendant *Sarah Herring*, who was born on the 27th of April 1814; the Defendant *Mary Anne Herring*, who was born on the 23rd of January 1816; the Defendant *Julia Herring*, who was born on the 28th of July 1817, and married the Defendant *Arthur Mostyn Owen* on the 30th of January 1851; the Defendant *Rosa Herring*, who was born on the 11th of May 1819, and who married the Defendant *Samuel Harvey Twining* on the 26th of September 1848. And he found that the said *William Harvey Herring*, and the said Defendants *Sarah Herring*, *Marianne Herring*, *Julia Owen*, and *Rosa Twining* were all of them then living; and he found that the said *William Harvey Herring*, in the month of April 1836, assigned all his share and interest under the will and codicils of the said testatrix *Sarah Morrison*, to his father the said *William Herring*; and that the said *William Herring* died on the 16th of January 1843, having first made his will, dated 18th October 1841, and thereby

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appointed the Defendant *Thrower Buckle Herring* and *Thomas Herring* executors thereof, and that they afterwards proved the said will in the Prerogative Court of the Archbishop of *Canterbury*: and he found that the Defendant *Judith Harvey* was born on the 22nd of May 1790, and married *Charles Robert Turner*, esquire, one of the Defendants in this cause, on the 19th of May 1816; and he found that the said *Sarah Herring* and *Judith Turner* were the two daughters mentioned in the will of the said testatrix *Sarah Morrison*, of her brother *Charles Savill Onley*. And he found that the said *Sarah Morrison*, at her decease, left only two brothers her surviving, viz. the said *John Harvey* and the said *Charles Savill Onley*, and no children or child of any deceased brother or sister. And he found that the said *John Harvey* made his last will and testament in writing, bearing date the 10th of December 1840, and thereby appointed his son, the Defendant *Roger Kerrison Harvey*, and the said Defendants *Thomas Blakeston* and *John Ranking*, executors of his said will; and that the said *John Harvey* died on the 9th of February 1842, without having revoked or altered his said will, which, upon his death, was duly proved in the Prerogative Court of the Archbishop of *Canterbury*, by the said Defendants *Roger Kerrison Harvey* and *John Ranking*, only power being reserved to the said Defendant *Thomas Blakeston*, to go in and prove the same, who thereby became and then were the legal personal representatives of the said *John Harvey*, deceased; and that the said *Charles Savill Onley* made his last will and testament in writing, bearing date the 11th of July 1838, and thereby appointed the said Defendants *Onley Savill Onley* and *Charles Robert Turner*, and the said *William Herring*, executors of his said will; and that the said *Charles Savill Onley* died on the 31st of August 1843,

without having revoked or altered his said will, which upon the 2nd day of October, 1843, was duly proved in the prerogative Court of the Archbishop of *Canterbury*, by the said Defendant *Onley Savill Onley* alone, power being reserved to the said Defendant *Robert Charles Turner* to go in and prove the same, who thereby became, and then were, the legal personal representatives of the said *Charles Savill Onley*, deceased.

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And as to the property comprised in the settlement, he found that the trust funds comprised in the indenture of the 5th day of May, 1823, and over which the said *Sarah Morrison* had a power of appointment among her relations in blood, consisted of 20,963*l.* 7*s.* 11*d.*, 2039*l.* 6*s.* 10*d.*, and 346*l.* 4*s.* 7*d.* Bank 3*l.* per Cent., making together the sum of 23,348*l.* 19*s.* 4*d.* Bank 3*l.* per Cent. Annuities, then standing in the name of the said Accountant-General, in trust in the two first mentioned causes, and the said sum of 7000*l.* 3*l.* per Cent. Reduced Annuities, also standing in the name of the said Accountant-General in trust as aforesaid, and the said thirty shares in the *Westminster Gas Light Company*, and which at present remained unsold. And as to the state of the testatrix's property at the time of her death, he found that the said *Sarah Morrison* died on the 15th day of February, 1827. And he found that the said *Sarah Morrison* was on the 23rd day of May, 1825, (the date of her said will,) possessed of the following personal estate, (that is to say) the sum of 772*l.* 2*s.* 6*d.* in cash in the hands of her bankers, Messrs. *Harvey & Hudsons* of *Norwich*, the same being the savings of her separate income, certain household furniture, plate, linen, china, books, and jewellery, which, at the decease of the said *Sarah Morrison*, were valued by Mr. *William Butcher* of *Norwich*, auctioneer, at the sum of

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716*l.* 10*s.*; an absolute and unrestricted power of appointment under her said marriage settlement over the sum of 3000*l.* payable at her death to such persons as she should by her will appoint. And he found that the said *Sarah Morrison* on the 15th day of February, 1827, (the day of her death,) was possessed of the following personal estate, viz., the sum of 992*l.* 7*s.* 10*d.* cash in the hands of her said bankers, Messrs. *Harvey & Hudsons*, being part of the savings of her separate income; the sum of 500*l.* stock, in the 3*l.* 10*s.* per Cent. Reduced Bank Annuities, the aforesaid household furniture, plate, linen, china, books, and jewellery, which at her decease were valued by the said *William Butcher* at the sum of 716*l.* 10*s.*, and the above power of appointment under her said marriage settlement of the said sum of 3000*l.*

The cause now came on to be argued, and the first question, which it was agreed should be argued independently, was, whether the power of appointment was executed at all; if it was, then there was another question between the next of kin and the appointees, whether the execution was not, to some and what extent, void for excess.

Argument.

Mr. *Follett* and Mr. *Busk*, for the Plaintiff, stated the nature of the case, and submitted the questions to the Court.

Mr. *Kenyon Parker* and Mr. *Haynes*, for *R. K. Harvey*, the representative of *J. Harvey*, one of the brothers of the testatrix, argued that the power was not executed. There were in this case four powers to be executed: 1st, the power to appoint the 3000*l.*; 2nd, the power to appoint the residue; 3rd, to appoint the plate, household furniture, &c.; 4th, to appoint the jewels and savings. The only power well executed was that relat-

ing to the 3000*l*. Beyond that there was nothing to show an actual intention to execute the power, and there must be such an intention; *Denn v. Roake* (a), *Andrews v. Emmott* (b). A general disposition will not operate as a disposition of the subject-matter of a power; *Jones v. Currie* (c), *Lovell v. Knight* (d), *Lempriere v. Valpy* (e), *Hughes v. Turner* (f), *Jones v. Tucker* (g), *Buxton v. Buxton* (h), *Clogstoun v. Wallcott* (i), *Churchill v. Dibben* (k). They cited this as to a particular portion of personalty, a sum of 1000*l*. (l). The power in this case is to dispose of a large residue. Now there are four powers to be executed, but the will refers not even to the testatrix's powers generally, still less to the several powers specifically, but in terms to one power only. She does not name either the trustees or the trust fund. Secondly, they referred to the clause in the settlement, pointing out the degree of consanguinity at the time of Mrs. *Morrison's* decease, and said the appointment could not be extended to persons who might not be living at the death of the appointor. The execution of the power was therefore excessive. [They cited also *Davies v. Thorns* (m), *Bennett v. Aburrow* (n), *Jones v. Currie* (c), *Lewis v. Llewellyn* (o), *Napier v. Napier* (p). They referred also to *Sugd. Powers*, 7th edit., vol. 1, p. 388 *et seq.*]

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Mr. *L. Oliver*, for the representative of *C. S. Onley*, followed in the same interest as the representative of *J.*

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| (a) 5 Barn. & Cress. 720. | (i) 13 Sim. 523. |
| (b) 2 Bro. C. C. 297. | (k) See 9 Sim. 447, notis. |
| (c) 1 Swan. 66. | (l) See p. 452 of 9 Sim. |
| (d) 3 Sim. 275. | (m) 3 De G. & S. 347. |
| (e) 5 Sim. 108. | (n) 8 Ves. 609. |
| (f) 3 Myl. & K. 666. | (o) 1 Turn. & Russ. 104. |
| (g) 2 Mer. 583. | (p) 1 Sim. 28. |
| (h) 1 Kee. 753. | |

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Harvey. He referred to the words "*said relations*" in the power. The delegation of the power is an excess and bad; 1 *Sug.* p. 213, 7th edit.

Mr. *Campbell* and Mr. *T. C. Wright*, for five nieces of the testatrix.

The appointment is good. There is an immediate power over the 3000*l.*, and another over the residue, and the testatrix deals with both. She has specifically disposed of every specific chattel which she has power to dispose of, and her appointment would have nothing to operate upon but the residue. She has appointed her savings. She has appointed the 3000*l.*, except so far as a portion of it may fall into what she calls her residue. There is an enumeration of her shares, &c., and books, and as to them she had an immediate power of appointment. She has disposed of her jewels, &c.; and she distinguishes the things over which she had *immediate* power, from those which she could only appoint subject to other interests, showing that she had distinctly in her view her different *powers*. In the gift of the residue, the words used indicate an intention to exercise the power. As a married woman she could have no residuary estate, and she uses the technical words "direct and appoint"; *Pidgley v. Pidgley (a)*. There is a portion of the appointment to the husbands of the nieces, which is no doubt bad, but that does not destroy the validity of the rest of the appointment; *Monk v. Maudsley (b)*. They relied also on *Churchill v. Dibben (c)*, *Morgan v. Surman (d)*, *Carver v. Bowles (e)*, *Ring v. Hardwicke (f)*, *Bailey v. Lloyd (g)*, to support the argument that an appoint-

(a) 1 Col. C. C. 225.

(b) 1 Sim. 286.

(c) Cited *supra*.

(d) 1 Taunt. 289.

(e) 2 Russ. & M. 301.

(f) 2 Beav. 352.

(g) 5 Russ. 330.

ment partly in excess of the power does not vitiate the appointment generally : *Hughes v. Turner* (a) is not applicable, because here the will is based and proceeds altogether on a general declaration that the testatrix is executing her power.

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[*Vice-Chancellor*.—The point here is that the will refers to *the* power, and the settlement contains four powers. She has exercised one or perhaps two, but has she exercised all?]

Argument continued.—The appointor has exhausted the objects of each specific power, and then it must be assumed that she had in view to exercise her general power over the residuary estate which was originally her own, and afterwards included in the settlement; *Clogston v. Wallcott* (b) is distinguishable; that was a case of a widow, and her will might be satisfied by treating it as a disposition, without treating it as an execution of the power. To sum up our argument, the power is well executed, because, 1st, there is a general declaration that the testatrix makes her will by virtue of her power; and 2ndly, she proceeds to limit and appoint correctly, according to the terms of the power.

Mr. *L. Wigram*, and Mr. *Law*, for Mrs. *Bellman*, another niece of the testatrix.

The testatrix looked at the property over which she had the power of appointment as her own. She disposes, first, of part of the 3000*l*. As to that, there is clearly a good execution of the power; and her directing the remainder to be part of the residue of her personal

(a) 3 My. & K. 666.

(b) Cited *supra*.

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estate, shows that she considered that over which she had a power, as part of her residuary estate. In order to be clear of *Lempriere v. Valpy* (a), it is sufficient to find the intention expressed that the property over which the testatrix has a power, she considers as *her own*. They referred to the passage in the 7th codicil: "I would have left it, &c., *but am limited*," &c. That is to say, I have exhausted all my powers of giving. Next it is said that when the testatrix gives the shares of her nieces, after their deaths, over to their children, grandchildren, or other relations in blood, &c., that is too remote; but the effect is merely to vest the interest absolutely in the nieces; *Kampf v. Jones* (b), *Sadler v. Pratt* (c).

[*Vice-Chancellor*.—The argument against the execution was not remoteness, but that the objects must be within the eighth degree of consanguinity and living at the death of Mrs. *Morrison*, and that the limitation here is to the nieces and to the issue of such of them as shall be then dead.]

But if all the excess is cut down, still the remaining part is good. They referred also to the second and third codicils.

Mr. *Keen*, for the children of Mrs. *Belmont*, one of the testatrix's nieces, contended that Mrs. *Belmont's* share (if the power was executed) was cut down to a life estate, with remainder to her children; *Phipson v. Turner* (d).

Mr. *Walker* and Mr. *C. Hall*, for the representatives of the children of *Sarah Herring*, a deceased niece of the testatrix, who died *after* the testatrix, and *before* her husband,

(a) Cited *supra*.

(c) 5 Sim. 632.

(b) 2 Keen, 756.

(d) 9 Sim. 227.

also contended that the power was well executed. In each appointment there is a reference either to the power or to the subject-matter. The testatrix was a married woman, and the persons in whose favour the power is exercised, are strictly within its terms. The will refers only to the property comprised in the settlement. All the subjects of the special powers are disposed of. The 3000*l.* is, as to a great part of it, disposed of by gift, legacies, &c., and the rest is to fall into her residue. Then there is a gift of the furniture to the husband. Then a specific disposition of the shares and of the jewels, &c. The only specific subject remaining is her savings, and those are also disposed of; the general residue is part of the property over which she has a disposing power; there is nothing else on which her gift of her residue can operate. The primary objects of the execution of the powers are her nieces; not only they can take under it, but none can take with them. All other parties who would take at all must take by substitution only; *Gray v. Garman* (a). The appointment is to all the nieces. If all the nieces had died without issue, they would have taken vested interests, which shows that the nieces are the persons to be benefited. The explanation she gives for excluding her nephews, shows that she was referring to a fund of considerable magnitude: such an explanation would have been unnecessary if she were speaking of the residue only of so petty a fund as the 3000*l.* They referred to *Elliott v. Elliott* (b).

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Mr. Bacon, for *C. Day*, a son, and *Blake*, an infant grandson of a niece, also in support of the execution of the power.

There is no case which says that where a married wo-

(a) 2 Hare, 268.

(b) 15 Sim. 321.

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man declares she makes a will in execution of a power, it shall not be an execution of the power. Here you find a reference to the settlement, and everything that in the will may have a reference to objects included in the settlement, is included in the execution of the power. The property settled was originally the testatrix's. The object of the settlement is, that if there are no children, the property is to go to her family. The will follows exactly in the same arrangement as to the bulk, but the testatrix had also a power of absolutely disposing of 3000*l.*, and she begins her will by dealing with that. When she comes to the bulk of the property she gives it among members of her own family, following the original scheme of the settlement. It is said, that the words importing the gift of all the rest and residue of her property, can be satisfied without resorting to the settlement. But that is not so. The description *my monies* is quite accurate; they had been her monies, and were hers in a sense, viz. hers to dispose of. In *Churchill v. Dibben* the execution of the power was upheld. In this case the whole was the testatrix's, as in *Churchill v. Dibben*, and the description of it as *my monies* shows what she intended. Then it is said that in the reference to the power, at the beginning of the will, it is referred to in the singular number. She uses the word *the power*, to indicate generally her power or capacity to make her will. She does not mean to confine herself to one particular *power*, but disposes of all over which she has a *power of disposition* by virtue of her *power to make a will*.

Mr. *Russell* and Mr. *Rogers*, for other parties, in the same interest as to this point.

The argument that having several powers, and referring to her *power*, she must have meant only *one* of

the powers is unfounded. The use of the word *the power* shows she meant it in the most general sense. When she is dealing with the 3000*l.*, she refers to the particular power, which shows that by the general reference at the commencement of the will she must have meant something more, otherwise it was useless.

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Mr. *Bailey* and Mr. *E. Turner*, for other parties.

All the cases referred to on the other side are cases in which no power was referred to; none of them are cases in which the will purports, as it does here, to be made exclusively under a power. The reference to the power is general; when that is the case a reference to the subject-matter is not requisite. Here the testatrix does refer in the most general manner to the power. As to the argument that she has appointed to persons not within the power; admitting that the power may have been exercised in excess, that does not show she did not execute her power as to the rest. Her speaking of the residue as *my monies*, does not show she was not speaking of the property subject to the power, for she uses the same word "my" in other parts of the will, when she clearly is appointing; she uses that word therefore with reference to the settled property which she treats as *hers*. They referred to *Curteis v. Kenrick* (a). In *Denn v. Roake* (b), the appointor was not a married woman.

Mr. *Bigg*, for children of *Caroline Onley*.

Mr. *K. Parker*, in reply.

As to the case of *Pidgley v. Pidgley* (c), the tes-

(a) 9 Sim. 443.

(b) 5 Barn. & Cress. 720.

(c) 1 Coll. C. C.

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tator there having a power of appointment, uses the words "or over which I have any right or power;" he notices in the gift of the residue the very power, and the judgment proceeds on that; both the power and the property are referred to, and the ground was that he had only that power and only that property. It is said that the introductory words here are to govern every thing, are to apply to every power in the settlement. How can that be, when the whole of the will can be satisfied by referring to that which she does in terms refer to? She executes her power over the 3000*l.*; so she disposes of her separate property; but she never alludes to her power over the general residue, nor to the subject-matter of that residue. Moreover she uses words applicable only to her own property, not to property which she can only dispose of under a power, and there is enough in her will to satisfy the words, treating them as a disposition of her own property. *Churchill v. Dibben* was decided on the ground of the word *estate and estates* carrying the property, it being real estate, and some personal property (1000*l.*) was expressly held not to pass.

On the 9th of June the VICE-CHANCELLOR delivered the following judgment:

Judgment.

The question here is, whether the will of a married lady operates as an execution of a power given to her by her marriage settlement. The will was made before the Wills Act, in the manner required by the law as it then stood, and it was executed with the forms required by the power. The circumstances are these: On the marriage of *Archibald Morrison* with *Sarah Harvey*, considerable personal property belonging to Miss *Harvey* was settled. There was also some property, but of less amount, settled by Mr. *Morrison*; that is not the subject of the power. The property of the lady consisted chiefly

of stock and of some *French* rentes, some shares in a Gas Company, and other property consisting of plate, linen, furniture, books, &c., and jewels, and other articles of that description. By the settlement, 20,000*l.* *South Sea* Annuities, 7000*l.* 3*l.* per Cent. Reduced Annuities, 3150*l.* 4*l.* per Cents., together with some shares in the *Westminster* Gas Company, were assigned to trustees in trust to pay an annuity of 500*l.* a year to the wife for her separate use, during the lives of herself and her husband. The rest of the dividends to be paid to the husband and wife during their joint lives. If the husband died first, the whole to the wife; there was no limitation to the children. If the wife died first, then she had power to appoint thus: 3000*l.* on her death was to go to such persons as she should by will appoint; in default, to her next of kin; so that as to the 3000*l.* she had a general power to appoint (in the event of her dying first) by will, as she pleased, to take effect on her death. As to the remainder of the fund, other than the 3000*l.*, the interest was to go to the husband during his life, if he survived her; and after his death the principal was to go among such of the wife's relations, not exceeding the eighth degree of consanguinity, as she should by will appoint; and in default of appointment, to her next of kin. So that there was a general power to take effect immediately on her death as to the 3000*l.* As to another part of the fund, there was a special power to take effect after the husband's death, in favour of the wife's relations within the eighth degree of consanguinity. As to both portions of the aggregate fund, a limitation in default of appointment to the wife's next of kin to the exclusion of the husband. There was also a sum of *French* rentes, a considerable sum, settled in the same way, so however as not to increase the annuity of 500*l.* given to the wife, and not to increase the 3000*l.*

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There are thus far, therefore, two portions of property, the subject of two distinct powers, using that term in its technical sense. The plate, linen, china, and household goods and furniture were assigned to trustees on trust that the whole of it should be enjoyed by the husband and wife during their joint lives, and if the husband died first, absolutely to the widow; but if she died first, they were to be enjoyed by the husband for life, and the remainder was subject to a general power to the wife to appoint by will, so that there was a general power of appointment over the plate, &c., to take effect after the husband's death. The fourth portion of the property, viz. two shares in two public institutions at *Norwich*, a ticket of admission to the *Norwich* Theatre, and jewels, watches, &c., were dealt with by the settlement thus: The husband covenanted that the wife should be allowed to enjoy them during her life, and by will, or other writing, to dispose of them as she should think fit; a general power therefore over that portion of the property, to take effect immediately after her death, and the covenant also extended to and included all that the wife might save out of the 500*l.* a year settled upon her for her separate use.

Now I shall treat this matter, so far as relates to the wife's power, as a case of four different portions of property, viz., 1stly, 3000*l.* over which there is a general power to take effect on the wife's own death; 2ndly, the residue of the stock and funds, the bulk in fact of the property, over which there is a special power to take effect in favour of a particular class on the husband's death; 3rdly, the plate, furniture, &c., over which she had a general power to take effect at the husband's death; 4thly, the shares in the public institutions, the ticket of admission, the jewels, &c., and the wife's

savings, as to which there is a general power to appoint by will, or during her lifetime, to take effect after the wife's own decease. The settlement was made on the 5th May, 1823; the marriage took place immediately after. There were no children of the marriage. Two years afterwards, viz. on the 23rd May, 1825, Mrs. *Morrison* executed the will on which the questions before me arise. The will sets out by a clause which is of great importance. It is thus: "I, *Sarah*, the wife of *A. Morrison*, do, by virtue of *the power*," &c. [His Honor read the introductory clause.] She not only refers to the instrument creating the power, but says that she makes the will accordingly *by virtue* of the power and authority reserved to her by the settlement. She then proceeds to recite the particular power to dispose of the 3000*l.*, "Whereas by virtue," &c. She then gives a series of legacies to various persons by appointing portions of the 3000*l.*, amounting in the whole to about 1000*l.*; she gives besides an annuity of 25*l.* a year to an old servant, for paying which she directs a sum to be set apart; and then she proceeds, "and from and after the death of the said *M. Sewell*, then-I desire that the sum of money so invested for securing the said annuity shall become part of the residue of my personal estate." She then proceeds with this clause, by which she refers not only to the 3000*l.*, but also to a part of the fourth portion, viz. the savings which she may make out of her separate estate. "And I direct and appoint," &c. [His Honor read the clause in p. 85, ending "I give all such savings to my husband absolutely."] I may here observe as to the savings out of her separate estate, that to enable her to dispose of that she required no special power. Still the settlement deals with that so as to profess to give her power to dispose of it as well as of her jewels, &c. Thus far, exclusive of the general refer-

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ence to the settlement, and the power in virtue of which she makes her will, we find a special reference to the power to dispose of the 3000*l.*, and a disposition of it; and a disposition of part of another portion, without any specific reference to the particular power affecting that portion. She then names as her executors her husband and Sir *R. Harvey*, and then without specifically referring to any of the powers, she proceeds to dispose of part of the property comprised in the fourth portion, and part of that comprised in the third. "I give and bequeath unto my said husband for his life," &c., her shares in the *Norwich* Public Library and the *Norwich* Literary Institution, and the ticket of admission to the Theatre of *Norwich*, &c. Indisputably, here she appoints to her husband absolutely, part of the property comprised in the fourth portion, and for his life a part of the property comprised in the third portion; and as to both these portions she speaks of them as hers—"my shares of the *Norwich* Public Library, my ticket of admission, the use of all my books during his life." She then proceeds to dispose in favour of particular individuals, of her jewels, &c., part of the property comprised in the fourth portion, and that disposition is to take effect immediately on her death. She then disposes of a portion of the property comprised in the third portion, viz. the plate, &c., which she describes as my plate, and as to that of which she so disposes, comprised in the third portion, she carefully gives it after the death of her husband. She then proceeds to dispose, but still only after the death of her husband, of other parts of the same portion of property; and she then gives four legacies of 200*l.* each, to four of her nieces, and she directs those legacies to be paid six months after the death of her husband, or within six months "of my death, if I survive him;" and then she says, "I give to my husband

all the rest of my household furniture, household linen," &c., part of the third portion of property.

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Then comes the ultimate gift on which the principal question turns. Now, as I have already said, there are four distinct portions of property over which there are different powers of disposition; besides the general reference to the settlement and to the general power, there is a specific reference to the power to dispose of the 3000*l.* and a disposition of it. There is, without reference to any specific power, an actual disposition of part of the property contained in the third and fourth portions, but as yet there is no specific reference to the special power over the second portion, nor any gift out of that portion of the property. Unless by what follows she does exercise her power of disposition over the second portion, she has not disposed of it all. Now the clause in question is this:—"And after payment of my just debts, funeral expenses," &c. [His Honour read the clause p. 88, appointing the residue down to, and including the clause, "but it is my will that the said *Charles Day* and *Louisa Day*," &c.] Now here I pause for a moment to consider the effect of this clause. By the preceding part of the will and settlement, the husband had a life interest in all the property. Thus far the husband had by the will or settlement a life interest in every part of the property, the subject of the settlement. Now she proceeds to give, after his death, what she describes as the rest and residue of my monies and other my personal estate. Now no doubt the terms "*my monies and other my personal estate*" do not in themselves include property over which the testatrix had only a power of appointment. But here she professes to give her monies, &c., and adds the words *I direct and appoint, &c.*, and she so directs

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and appoints to persons who are within the description of the persons in whose favour the specific power was created; viz. relations within the eighth degree. Now the question is, whether this clause (taken with what follows) operates as an execution of the power of appointing the property comprised in the second portion; that is, all the remainder of the stock, &c., after setting apart the 3000*l.* out of it.

The question whether a will (duly executed) operates as an execution of a power is a question of intention, and the Courts have determined that there are only two modes in which the intention can be collected. The first is by the will referring to the power, and expressing an intention to execute it, though not referring to the property; the second, by dealing with the specific property, though not referring to the power. The proposition is accordingly well settled that there must be a reference either to the power or to the property comprised in the power. I am, therefore, to determine this question as to the property comprised in the second portion. Did the testatrix intend to execute her power as to three portions of the property, the smaller portions of it, (which she clearly did,) and not to execute it as to the other portion, comprising the great bulk of the property? She sets out by stating that she makes this testamentary instrument by virtue of *the* power. Now it appears to me that unless there is something rendering it almost impossible to suppose that as to some particular portion of the property, she meant to execute the power, that clause alone leads strongly to the conclusion that she did intend to exercise the power as to all.

It is argued upon that, that she refers to *the* power, while she had in fact *four* powers; and it is said she does not

say she makes her will by virtue of the four powers, but by virtue of *the* power; and then she proceeds to recite expressly *one of the powers*. Now no doubt, in technical language, this lady may be said to have had four powers. But substantially it may be said with equal accuracy, that she had *one* power to dispose of *four portions* of property; she had no power to make a will at all (otherwise than as to her savings), except as she had it by force of the settlement, and she says by *virtue of the power* "I do," &c.; and then, although she only mentions specifically one of the powers, or to use another form of language, the power to dispose of one portion of the property, she does, without reference to the power to dispose of the third portion and fourth portion, actually dispose of them. Now, if her referring to the power to dispose of the first portion is a reason for inferring that she did not intend to dispose of the second, it is equally a reason for inferring that she did not intend to dispose of the third and fourth: but I am precluded from such an inference, by the fact that she *has* disposed of them. It does not, then, appear to me that the fact of the testatrix referring (after the general reference at the commencement of the will) to the particular power as to the 3000*l.*, and not referring expressly to the other powers, is a reason why we are to conclude that there was not an intention to execute the power to dispose of the second portion. But I find that when she disposes of the remainder of the property comprised in the third and fourth portions, she uses, with regard to that, the same language as in the clause relating to the *second* portion; viz. she speaks of *my* shares, &c. Now it has been held repeatedly that if there is a reference to the power, and the will purports to be made in pursuance of the power, it is not necessary to describe the property, but the expression "my personal estate" is sufficient. Suppose

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there had been no power but the power to dispose of the second portion, and the will had said, "by virtue of *the* power I make my will," and had then said, "I give all *my* money," surely upon the authorities, that would be sufficient to operate as an execution. Am I to say that because there is a power to dispose of *four* portions of property, and the testatrix refers to *the* power in the singular, I must hold that there is no reference to the power to dispose of the second portion? The real question is this: It being admitted that there is no reference to the property itself comprised in the second portion, is there here a reference to the power to dispose of that portion? I think there is a reference to the power, and that when she uses the words *power and authority*, she does it in the sense of the power and authority given by the settlement to make a will, disposing of the various portions of property comprised in the settlement; I am therefore of opinion, so far as regards the property comprised in the second portion, and without any doubt upon the subject, that the testatrix did intend to execute her power over that portion; and it is not immaterial to observe that with reference to every portion of property which she professes to dispose of, she always has regard to the question whether, by the terms of the settlement, her power could be exercised to take effect immediately on her own death, or only on the death of her husband, he surviving her. Then it is said that by this residuary clause she makes the property subject to the payment of debts, and that shows she had no intention to execute her power, because she had no right by the power to charge debts; but it must be considered what is contained in this gift. First, There is the bulk of the stock, the second portion; but there is more; she had, when disposing of the 3000*l.*, given out of it about 1000*l.*; and she had directed that what should be set apart to answer the annuity should be part of her

personal estate ; and she directs, that what should remain of the 3000*l.* and the fund set apart to meet the annuity, and also her savings out of her separate estate, should go to her husband for his life, and after his death, all that was to be part of the residue of what she calls her personal estate, so that what she disposes of as *my monies*, as to part of it, included some property which she is disposing of only by virtue of the power given by the settlement. Now the whole property was originally hers, and still was hers after the settlement in this sense, that there is no limitation to children. She looked upon it as hers, and this is not matter of conjecture, for she tells you that the property in the settlement she calls hers ; she speaks of *my plate*, *my books*, &c. ; and she winds up the whole by saying that a certain portion of what she has given shall fall into the residue, and she gives it all after the death of her husband to go to the persons within the prescribed degree of consanguinity. I think this is a stronger case than most of the cases of valid execution of a power ; it is stronger than *Churchill v. Dibben* (a), which has only, comparatively, recently been made public.

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However, it would be useless for me to go through all the cases ; it is sufficient to say that the principle is well established ; that it is a question of intention, and there must be a reference either to the power or to the property ; and it would be a loss of time to compare the language of the different instruments on which the decided cases have turned. I have gone through the cases cited to me and many others, and I have, upon considering them, arrived at the conclusion, that if ever there was a case in which an intention to execute a power

(a) Cited *supra*.

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was shown, this is that case; and my opinion is, that this will is a valid execution of all the powers, that is, of the power and authority to dispose of all the portions of the property.

Now to consider another part of the case, viz. that having in the commencement assumed to appoint that which she describes as *the remainder of my monies* to certain persons, or rather to certain classes, she afterwards goes on to deal with the shares appointed in a particular way. She first provides for the daughters of her brother *John*, her nieces, a class described; next she provides for *Charles Day* and *Louisa Day*, children of a deceased niece; thirdly, for the two daughters of her brother *C. S. Onley*; that is three classes, the daughters of *John Harvey*, the two children named of her deceased niece, and the two daughters not named of her brother *Charles*; and their shares are to go to such of them as shall be living at her husband's death, and to the issue of such of them as shall be dead.

Now I ought not to assume a possibility almost beyond possibility,—that, at the death of the husband, any of the nieces living at his death should have died leaving great grandchildren of great grandchildren, which would be requisite to bring their issue beyond the eighth degree. Thus far, then, the limitations are within the power, and thus far there is an absolute appointment. But then she says further, that the shares of her nieces shall be invested for their separate use, and so far again there is nothing exceeding the limits of the power.

She then proceeds to direct the settlement of the shares in favour of persons who are not objects of the power; that is, after the deaths of her nieces, the in-

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come she appoints to their husbands, and subject thereto the principal to their children or grandchildren, or any other relation in blood to her nieces, as they may appoint. Now I need not say that the nieces may have blood relations who are not relations of the testatrix. We have then an appointment to the husbands and to persons who are not within the prescribed class, but who are equally objects of appointment with other relations of the blood of the nieces who may be within it. Now when an appointment is to a class, some of whom are within, and others are not within, the proper limits of the power, if the class of persons is ascertained, so that you can point to *A.*, who is within the limits, and say so much is to go to him, though the others are not within the limits, yet the appointment to *A.* shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails. I think therefore that here the limitations attempted to be engrafted on the shares of the nieces by settlement are void, except the limitation to their separate use for their lives, and, as to *Caroline Onley's* share, the limitation over to the other nieces and their issue on her decease.

[His Honor was proceeding to dispose of the question what would be the effect on the limitations, in themselves good, if they stood alone, of their being coupled with limitations in excess of the power, when he was reminded that it had been agreed that the question of the effect of the appointments should not be argued till the question whether the power had been exercised at all, should have been decided. The Court having now decided that, the remaining points were still to be argued; the case accordingly stood over till the 12th July, when

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the questions between the appointees and the next of kin, and the appointees *inter se*, were argued.]

Mr. *K. Parker* and Mr. *Haines*, for the representatives of *John Harvey*, who would be entitled in default of appointment.

We are entitled at any rate to everything attempted to be appointed after the life estates of the nieces; the intention was to appoint to the nieces, not absolutely, but only for life. The persons to whom an attempt is made to appoint in remainder, are not capable of taking; but that failure cannot enlarge the original gift; and the unappointed part, viz. the remainders over, go to the next of kin.

But we say the effect of the language of the appointment goes much further. The appointment is to a class who shall be living at the husband's death; some of the appointees might be, and in fact were, and some of them might not be, and in fact were not, living at the husband's death. Now a gift to an unascertained class, some of whom may be capable of taking, and some not, is altogether bad. *Sadler v. Pratt* (a) will be cited against this, but that case is distinguishable from the present. There the class was ascertained at the death of the appointor; here it cannot be ascertained till the death of the husband. *Routledge v. Dorril* (b) and *Gee v. Audley* (c) support our argument. There the appointment was held bad. [They cited also *Lassence v. Tierney* (d).] We say, therefore, that the appointment to the nieces was altogether void; but if not void *in toto*, at least only

(a) 5 Sim. 632.

(b) 2 Ves. 356.

(c) 1 Cox, 324.

(d) 1 Mac. & Gord. 551.

good as an appointment of life estates. As to the share of *Caroline Onley*, this point arises: she died in 1845, before the testatrix's husband. She therefore could take nothing, and her share is unappointed, and goes to the next of kin.

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Mr. *L. Oliver* argued in the same interest, for the representatives of the other next of kin.

Mr. *L. Wigram* and Mr. *Law*, for Mrs. *Bellman*, cited *Burrell v. Baskerfield* (a).

Mr. *Campbell* and Mr. *T. C. Wright*, in support of the appointment to the nieces.

There is primarily a good appointment to the nieces absolutely. The attempt to cut that down fails; if it fails as to the intended appointees, it fails also in destroying the antecedent well appointed interests; it is in fact a nullity, and the original gift absolutely to the nieces, is left subsisting.

Mr. *Walker* and Mr. *C. Hall*, for the persons representing the children of *Sarah Herring*, who died after the testatrix and before her husband, cited *Shuttleworth v. Greaves* (b), *Viner v. Francis* (c), *Gray v. Garman* (d), *Salisbury v. Petty* (e), *Winckworth v. Winckworth* (f).

Mr. *Bailey*, Mr. *Edward Turner*, Mr. *Bacon*, Mr. *Bigg*, Mr. *Wetherell*, and Mr. *Keen*, for other parties.

(a) 18 L. J., Ch. 422.

(b) 4 Myl. & K. 35.

(c) Br. C. C. 658.

(d) 2 Hare, 268.

(e) 3 Hare, 86.

(f) 8 Beav. 576.

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Mr. *K. Parker*, in reply, referred to 2 *Spence*, 104,
2 *Jarm.* on Wills, 75.

The following cases were also cited in the course of the arguments :—*Palsgrave v. Atkinson* (a), *Tytherleigh v. Harbin* (b), *Bebb v. Beckwith* (c), *Trower v. Butts* (d), *Smither v. Willock* (e).

On the 22nd July, the VICE-CHANCELLOR delivered the following judgment :—

In this case of *Harvey v. Stracey*, it having been determined that the testatrix, Mrs. *Morrison*, intended to execute that power which was given to her by the settlement in respect of what is in the settlement called the residue of certain property, what I have now to determine is, what is the effect of the appointment which she has made or purported to make of that portion of the property. The first question that has been raised is a question respecting the construction of the power itself. The power is in this form: The trustees are, after the death of Mr. *Morrison*, in case of his surviving his wife, to stand possessed of the fund in question, and the dividends, interest, and annual produce thereof, in trust for all and every, or such one or more, exclusively of the others or other of the relations in blood of the said *Sarah Harvey* at the time of her decease, within the eighth degree of consanguinity to her at such age, day, or time, or respective ages, days, or times, and if more than one in such shares and proportions, and with such annual sums of money, and future, or executory, or other

(a) 1 Coll. 190.

(b) 6 Sim. 329.

(c) 2 Beav. 308.

(d) 1 Sim. & Stu. 181.

(e) 9 Ves. 233.

trusts, such annual sums of money, and future, or executory, or other trusts being for the benefit of the said relations in blood of the said *Sarah Harvey*, within the degree aforesaid, or some or one of them, and in such manner as the said *Sarah Harvey* shall, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses, direct or appoint. Now it is contended that although the appointment must be made originally to relations living at the time of her decease within the eighth degree of consanguinity, yet that it is competent under this power to Mrs. *Morrison* to engraft any limitations or any charges on the property she may thus appoint, in favour of persons who, being relations within the eighth degree of consanguinity, might not be living at her decease; in other words, that the restriction of the class to persons living at her decease, does not apply to the subsequent part of the power, but only to the prior part of it. I confess it appears to me there is no ground for questioning the construction of the power. The settlor meant that it should be appointed among the relations of Mrs. *Morrison* within the eighth degree of consanguinity, living at her decease; and having described that class of persons, she afterwards mentions the *said* relations in blood within the degree aforesaid. Now supposing that the power had been to appoint to relations living at the death, and afterwards there was mention of the *said* relations, surely that would mean the relations living at the death; there it is the relations within the eighth degree living at the death, and then afterwards the *said relations within the degree aforesaid*. I have no doubt that the meaning is, that the limitations which it

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is competent to the appointor to make, or the charges which she may create upon the fund, were required to be to the same class of relations as the original appointment, viz. to relations within the eighth degree living at the death of Mrs. *Morrison*; and that any appointment to relations not living at her death, although within the eighth degree, is invalid and cannot take effect, as being made to persons who were not appointees designated by the power.

That being, in my opinion, the construction of the power, the next question for consideration is, what is the effect of that part of Mrs. *Morrison's* will, which in the first instance purports to execute this power. I leave out of consideration, for the present, the subsequent part of the will, by which, after having made an appointment, she proceeds to direct how the shares thus appointed shall be settled. Now, in the first instance, the appointment is made in favour of the following description of persons: All and every the daughters of my brother, *John Harvey*, *Charles Day*, and *Louisa Day*, *nominatim* (they being children of a deceased daughter of *John Harvey*), and the two daughters of my brother, *Charles Savill Onley*. I stop there to consider what class would be included in that description. The question is, whether that description would or would not include any daughters of the brother, *John Harvey*, who might be born *after* the death of the testatrix. Now the first question for consideration is, what would be the construction of those words if, instead of their being used in an appointment under a power, they were used by the testatrix in bequeathing her own property. Supposing she had bequeathed her own property after the death of her husband, Mr. *Morrison*, to all and every the daughters of her brother, *John Harvey*, and the two *Days*, *nominatim*,

and the two daughters of *Charles Savill Onley*, would or would not that include any daughters of *John Harvey* who might be born after the death of the testatrix? Now the plain rule, I may say the universal rule, in such a case as this, is, that where a bequest is made to the children of *A.* at the death of another person, or at a future period, all the children of *A.* who shall come into existence before the period of distribution shall be included in that bequest. Now in this case, by the very terms of the settlement which created the power, *Mr. Morrison*, the intended husband, had a life interest in this portion of the property; and then the power being to appoint after his death, the testatrix appoints to all and every the children of her brother, *John Harvey*, that is, appoints at the death of her husband to all and every the children of *John Harvey*. If that had been a bequest by a testator of his own property, there is no doubt it would have included every daughter of *John Harvey* who might come into existence after the death of the testatrix and before the death of *Mr. Morrison*, which was the period of distribution. Now this rule applies not only to the case when the period of distribution is postponed until the expiration of a life estate created by the testator himself, but to the case where he has only a reversionary interest expectant upon a life estate previously subsisting, and then disposes of the fund to take effect after the death of the tenant for life, as in this case. That was held in the case of *Walker v. Shore* (a), by Lord *Eldon*. He said, the distinction attempted between the case where the gift is to the children living at the expiration of a life, where the life interest is created by the testator himself, and the case where the testator has only a reversionary interest ex-

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(a) 15 Ves. 122.

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pectant upon an existing life estate, is too thin ; and the same rule applies to the one as to the other ; and this rule of letting in all members of the class who shall come into existence before the period of distribution, is so strong that it must prevail even in a case in which the Court thinks it very probable that the testator meant to confine the bequest to children living at his death. That was expressly laid down by Lord *Eldon* in that same case of *Walker v. Shore*. But it is contended that in this case the terms of the bequest itself present reasons for putting a different construction upon this, even if it had been the case of a bequest ; for it is contended that inasmuch as in this case the bequest (or rather in this case the appointment, but I am treating it at present as if it had been a bequest of the testator's own property,) is to all and every the children of my brother *John* and to the two *Days, nominatim*, and to the two daughters of my brother *Charles* ; it is contended that inasmuch as she mentions the two daughters of my brother *Charles*, meaning of course two daughters who were then existing, and whom she then knew and meant to designate as individuals, therefore the same construction must be applied to the bequest to the daughters of her brother *John*. It is said that it is unreasonable to suppose that she meant differently with respect to the daughters of her brother *John*, from that which she clearly meant as to the daughters of her brother *Charles* ; for that as to the daughters of her brother *Charles* she clearly meant to include only the two who were then living. Now even if this argument were sufficient to raise in my mind an impression that the testatrix probably did mean to include only the daughters then living, yet even in that case, on the authority of Lord *Eldon's* opinion in *Walker v. Shore*, I should still be obliged to adhere to the rule which has really become

a canon of construction. But so far from this argument appearing to me to arise from the circumstances upon which it is founded, it appears to me that they afford an argument directly the contrary way ; for if she meant to include only the daughters of *John* then living, as well as only the daughters of *Charles* then living, why in describing what daughters of *Charles* she meant to take should she carefully mention "the two daughters of my brother *Charles*," and in the very same sentence, in describing what daughters of *John* she meant to take, use language which seems carefully intended to extend the description to *all* the daughters of *John*, whether they should then be living or not ? Besides, the argument for excluding any after-born daughters of *John* is based upon the assumed probability that the testatrix had the same intention with respect to the daughters of *John* as she had with respect to the daughters of *Charles*. That is the basis of the argument ; and yet the argument, even if it were successful, would still fail to work out this assumed parity of intention with regard to the daughters of *John* and the daughters of *Charles*, for it is clear that if a daughter of *John* had been born between the date of the will and the death of the testatrix, such daughter of *John* must necessarily have been included in the bequest, even assuming that daughters born after the death of the testatrix might be excluded ; the gift must necessarily include all the daughters of *John* alive at the testatrix's death ; but with respect to the daughters of *Charles*, by the very terms of the bequest to those daughters, which terms are "to the two daughters" of *Charles* ; if *Charles* had had a daughter born between the date of the will and the death of the testatrix, that daughter would be excluded. If we are to assume that the testatrix had the same intention with respect to the daughters of *John* as she had with respect to the

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daughters of *Charles*, which is the whole basis of the argument, the only construction which could give effect to that supposed intention would be to limit the words "all and every the daughters of *John*," to daughters living at the date of the will. That is a construction which it would of course be impossible to maintain, and indeed none of the counsel have attempted to suggest any such construction. If then this had been the bequest of a testatrix's own property, I think it quite clear that all the daughters of *John*, who might be born at any time before the fund became distributable by the death of Mr. *Morrison*, would be entitled to share; can I then put a different construction upon the terms of the will because this is a case not of a bequest of a testatrix's own property, but of the execution of a power? Suppose the power had been a general power, that is, to appoint to any body that the testatrix pleased, it is clear I could not have varied the terms of the bequest in order to give it effect; I must put the same construction upon the terms as I should have put upon them if it had been a bequest of the testatrix's own property. But then it is contended that I ought to put a different construction on the words in the present case, in order to make them fit on to the terms of the power, *ut res magis valeat*. Now it does appear to me, I confess, that when the testatrix in executing a power, has adopted language which, when used in an ordinary case of bequest, has a natural, reasonable, and appropriate meaning, a meaning so invariably applied to it by the Courts, that it has become a canon of construction, it would be most dangerous to wrest that language to a different meaning, for no other reason than that by so doing we shall make it better suit and fit on to the power. I know of no authority that would justify me in so doing; on the contrary, it has been decided over and over again, that it cannot be done

even for the purpose of preventing an appointment being altogether invalid on account of remoteness ; and that is a case surely in which the argument *ut res magis valeat* would apply much more strongly than to the present case. I am of opinion that I must apply to the language of the testatrix, the same construction which it would receive in the case of an ordinary bequest, and hold that any daughter of *John*, born after the death of the testatrix and before the death of Mr. *Morrison*, when the fund would become distributable, would be included in the terms of the appointment. I have abstained from laying any particular stress upon these words "*all and every* the daughters of *John*," because in my opinion the construction would have been the same if those words had not been there ; but I cannot help thinking that the introduction of those words "*all and every*," tends very much to negative the supposition that the testatrix, giving to all and every the daughters of *John*, did not mean to include all and every the daughters of *John*.

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Being then of opinion that the testatrix has in fact appointed or attempted to appoint the fund to all the daughters of *John*, including those who might come into existence at any time before the death of Mr. *Morrison*, and to the two *Days*, and to the two daughters of *Charles*, I have next to consider the question what issue of those persons are comprised in the description, "and to the issue of such of them as shall then happen to be dead;" that is, at the death of Mr. *Morrison*, because it is given to all and every the daughters of *John* and the two *Days*, and the two daughters of *Charles*, or such of them as shall be living at the death of Mr. *Morrison* ; and then come these words which I have now to consider, "and to the issue of such of them as shall *then* happen to be dead." What issue, I say, would

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be included in that appointment or in that bequest? I think there can be no doubt whatever that this description cannot properly be limited to the issue of those daughters living at the testatrix's own death, but that it must include all the issue who might come into existence at any time before the death of Mr. *Morrison*. The result then is this, that whereas the objects contemplated by the power are confined to persons living at the testatrix's own death, the persons or class of persons to whom the testatrix has appointed the fund or attempted to appoint the fund, comprise or might comprise persons not living at her death; that is, comprise or might comprise persons not being objects designated by the power. Indeed, it is obvious that it might have happened that not one of the persons to whom the testatrix intended to appoint and did appoint in terms, might have been an object of the power; for, by the terms of the appointment, no one could take who should not be living at the death of Mr. *Morrison*; and it might have happened that all the daughters of *John* and *Charles* living at the testatrix's death, and all their issue living at her death, and the two *Days*, might have died before Mr. *Morrison*, and at his death there might have been living only after-born daughters of *John* and after-born issue of some of the deceased daughters, not one of whom would have been within the scope of the power. Now the events that actually happened were these:—First of all, there was no daughter of *John* born after the date of the will or after the death of Mrs. *Morrison*; one of the daughters of *John* had died leaving children; one of the two daughters of *Charles* had died leaving children, and *Louisa Day*, one of the two *Days* named in the will, who had married Mr. *Blake*, had also died, leaving a child. Two of the children left by the deceased daughter of *John* (that is, Mrs. *Onley*) were living at

the testatrix's death, one was *en ventre sa mère*, and two others were born after the testatrix's death. With regard to the children left by Mrs. *Herring*, the deceased daughter of *Charles*, there were five of them, and all five were living at the death of the testatrix, and therefore objects of the power; and with regard to the child of Mrs. *Blake* (that is, *Louisa Day*), that child was born after the testatrix's death, therefore that child was not an object of the power. So that of the persons alive at Mr. *Morrison's* death, who were described in the description of persons or class of persons in whose favour the appointment was made or purported to be made, some were objects not designated by the power, as having been born since her death. They were all, however, within the power, so far as being all within the eighth degree of consanguinity. In this state of things the following points have been insisted on by the counsel for the next of kin of the testatrix, who would be entitled in default of appointment by the terms of the settlement. First, they say with respect to the appointment in favour of the daughters of *John*, and the two *Days*, and the two daughters of *Charles*, or such of them as should be living at the death of Mr. *Morrison*, that as this would have included daughters of *John*, who might have been born after the testatrix's death, that is, as it would have included persons not being objects designated by the power, the appointment is altogether void on that account *ab initio*, although it turned out that there were no such persons. And secondly, they contend with respect to the appointment in favour of the issue of such of those as might be dead at the death of Mr. *Morrison*, that as these not only would have included, but actually did include, issue born after the testatrix's death, that is, persons not being objects of the power, the appointment becomes void on that account. Therefore the

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abstract questions to be decided are these : first, is an appointment which is made to take effect at a future period, void *ab initio*, because it may, when that period arrives, include persons not being objects designated by the power ; and secondly, does such an appointment become void *in toto*, because it turns out, when the period does arrive, that it actually does include persons not being objects of the power. Now the authorities upon these two questions do not go quite to the precise extent of distinctly answering those questions, but with their assistance, and calling in aid some conclusions which I think cannot be controverted, it appears to me that it is not difficult to solve these questions. The case of *Sadler v. Pratt* goes at least to this extent, that an appointment made in favour of persons, some of whom are objects of the power, and others not, might be valid *quoad* the shares appointed to objects of the power, although void as to the rest. That was distinctly decided in *Sadler v. Pratt*. But it is contended on the part of the next of kin, that that case does not govern the present, because there the appointment, which was made by will under a power, was to take effect immediately on the death of the appointor, and therefore at the moment when the will executing the power came into operation, the persons in whose favour the appointment was made were ascertained ; and it was very well known which of the objects was capable of taking, and what share each would take ; whereas in the present case, every thing must be kept in suspense until the death of Mr. *Morrison* ; for until that event happens, it could not be known who the appointees would be, or which of the appointees would be capable of taking as objects of the power, or what shares they would respectively take as objects of the power, or what shares they would respectively take by virtue of the appointment. Is it then essential, for that is the question that is thus raised,

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is it essential to the validity of an appointment, that these matters should be capable of being ascertained at the moment when the will exercising the power comes into operation by the death of the testator? That it is not so will, I think, be made apparent by suggesting a few very simple cases. Suppose a fund settled in trust for A. for life, and after his death in trust for such of A.'s children as he should by will appoint—a very common case of power. Supposing that he by will appoints equally among such of his children as being sons should attain twenty-one, or being daughters should attain twenty-one, or marry under that age; and he dies leaving several infant children. Could it be contended for a moment that that appointment would not be perfectly valid? It is clear it would not be too remote; it would be perfectly valid; and yet in that case, which is one of the simplest that can be suggested, at the death of the appointor it cannot be ascertained who will take under the appointment, or in what shares they will take, because it cannot then be ascertained, inasmuch as the children are still infants, which of them being sons will attain twenty-one, or which of them being daughters will attain twenty-one or marry under that age; therefore it cannot be ascertained until a future period what persons will take under the appointment, or in what shares they will take. Now in the same supposed case of a fund settled in trust for A. for life, and after his death for such of his children as he should appoint, let me introduce another ingredient into the terms of the appointment, and suppose he appoints one moiety of the fund to such of his children as, being sons, should attain twenty-one in equal shares, and the other moiety to such of his daughters as should attain twenty-one or marry under that age, in equal shares. There again the appointment would, beyond all controversy, be valid, and

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yet there it would be impossible to ascertain, until a future period, who would take either of those two moieties. And suppose it should turn out, in the case that I have last suggested, that some of the sons did attain twenty-one, but no daughter attained twenty-one or married under that age, what would be the effect? The effect would be that it would be perfectly valid and good as to the appointment of the one moiety among the sons who did attain twenty-one, but of course there would be no appointment as to the other moiety by reason of there being no daughters living to attain twenty-one or marrying under that age. Now I will suppose another case not quite so simple. Suppose the fund settled in trust for *A.* during his life, and after his death in trust for such of the children of *B.*, another person, as *C.* should by will appoint. If *C.* by his will appoints the fund in equal shares to such of the children of *B.* as shall be living at the death of *A.*, and then *C.* dies in *A.*'s lifetime, of course it could not be doubted that that would be a good appointment. But it would be in suspense until the death of *A.* which children of *B.* will be living. It cannot be ascertained until a future period, namely, the death of *A.*, which children of *B.* will take under the appointment, and yet it cannot be suggested but that that would be a perfectly valid appointment. So again, in the same case, if *C.* by his will were to appoint the fund in this way, to such of the daughters of *B.* as, at the death of *A.*, shall be living, and have children then living, in such shares as shall be in proportion to the number of their respective children then living, which would be a very reasonable and rational appointment; and if there should be no daughter then living and having children then living, then among the sons of *B.* in equal shares. That would be a good appointment, and yet, though putting a somewhat more

complicated case, you cannot ascertain who will take, whether it will be daughters or sons, in what shares they will take, how many there will be, how many will take at the death of A.; and yet I am putting a case where there can be no question as to the validity of the appointment. In all these cases, if you apply the test of importing the same limitations into the instrument creating the power, which is the test of the validity of the appointment, they would be perfectly good and valid limitations, and there is no reason why they should not be good and valid limitations when created by the appointment under the power; yet in all these cases it is left in suspense until a future period who are the persons who will become the appointees, and in what shares they will respectively take. If, then, an appointment by will is not void by reason that the appointees, who are to take by virtue of the appointment, or the shares which they are to take, cannot be ascertained until a future period, and if moreover an appointment is not void *in toto* by reason that some of the persons in whose favour the appointment is made are not objects designated by the power, as decided in *Sadler v. Pratt*; it seems to follow, first, that an appointment which is made to take effect at a future period is not void *ab initio*, because it may, when that period arrives, include persons not being objects of the power; and secondly, that an appointment made to take effect at a future period does not become void *in toto*, because it turns out, when that period arrives, that it actually does include persons not being objects of the power. But then it has been argued, on the part of the next of kin, that the case of *Gee v. Audley*, and the case of *Routledge v. Dorrell*, are authorities the other way. Now those two cases were decided entirely upon the ground that the attempted limitation was void for remoteness.

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Indeed with respect to *Gee v. Audley*, as reported by *Cox*, it does not appear to have been a case of appointment under a power at all; *Cox* states it as a simple bequest of the testator's own property, but whether it was the case of an appointment or a bequest, the limitation was held void in *Gee v. Audley*, merely because the property was given to a class of persons who could not be, or at all events might not be, capable of being ascertained within the period of a life or lives in being at the death of the testator, and twenty-one years after; in other words, it was void for remoteness. *Routledge v. Dorrill* was the case of an appointment under a power to a class of persons who might not be ascertained within the period of a life or lives in being at the date of the settlement which created the power, and twenty-one years after. In accordance with the well-known rule which I have already adverted to, that an appointment under a power will be void for remoteness, whenever the same limitation, if contained in the instrument creating the power, would be too remote, if you introduce the limitations created by the appointment into the instrument creating the power, and see whether those limitations in the settlement would be bad, then they will be bad when created by the appointment; but if they are good when thus introduced into the settlement itself, they would be perfectly good and not too remote when created by the instrument which exercises the power of appointment. Now in this case of *Routledge v. Dorrill*, by the marriage settlement creating the power, a particular fund was settled after the death of the husband and wife in trust for the children and grandchildren or issue of the marriage, in such shares and proportions, manner and form, as the husband and wife should by deed appoint, or as the survivor should by deed or will appoint. The wife being the survivor, by her will appointed

different portions of the fund thus, each several portion was appointed, at least those upon which the question turns were appointed, to one of her daughters for life, and after her death to her children in equal shares. Now the persons designated by the power were children and grandchildren, or issue of the marriage. The testatrix appointed it to children for their lives, to daughters for their lives, and after their deaths to children, to their children, that is, to grandchildren of the marriage. Therefore the persons in whose favour the appointment was made were entirely within the class designated by the instrument creating the power; but why was it held void? The appointment was held void, not because it comprised or might comprise persons not designated by the power, but because the appointment comprised or might comprise persons who could not be ascertained until after the period prescribed by the rules relating to perpetuities, because it would include by its terms all the children of any daughter, not limited to all the children of the daughter living at the death of some person who was alive when the power was created by the settlement, but it would include children of a daughter who was born after the death of the persons exercising the power; that is, after the death of some person living at the date of the settlement, and for that reason it was held void. The ground of the decision had nothing to do with the question whether the class in whose favour the appointment was made was or was not confined to the same persons in whose favour the appointment could be made by the terms of the power, but simply on the ground of its being too remote. Now apply to this case the test of importing into the instrument creating the power, the limitations attempted to be created by the instrument exercising the power, and then it would stand thus: a limitation by the settlement in trust for

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the husband and wife for their lives ; after their deaths to unborn children for their lives ; and after their deaths to the children of those unborn children. Obviously that is too remote. Now apply the same test to the present case. (I am now confining myself to this portion of the will, I am not going into the ulterior attempt to settle the shares, but I am confining myself to the earlier part of the appointment in which she appoints shares to certain classes.) Applying that test, how would the limitations stand in the instrument creating the power ? It would be a limitation to Mr. *Morrison* for his life ; after the death of Mr. *Morrison* to the daughters of the testatrix's brother *John*, and the two *Days*, and the two daughters of her brother *Charles*, or such of them as should be living at the death of Mr. *Morrison* (a person in existence at the date of the settlement), and to the issue of such of them as should be then dead. That would confine all the persons intended to take, including the issue intended to take, to those who were living at the death of Mr. *Morrison* ; for neither could any daughter of *John* or *Charles*, or either of the *Days*, take unless living at the death of Mr. *Morrison* ; neither could the issue of any persons who died in the mean time take unless living at the death of Mr. *Morrison*. So, by the terms of the appointment, limitations are created, which, if imported into the original settlement, are perfectly valid on the question of remoteness, by reason that they are all to take effect ; that is, that all the persons to take must be ascertained at the death of Mr. *Morrison*, Mr. *Morrison* being a person who was in existence at the time when the power was created by the settlement. Now it appears to me that the true rule applicable to the matter now under consideration is this : If a fund is appointed to objects of the power, that is, if in that respect it is correct, the appointment will be

valid, notwithstanding that the persons who are to take as appointees, or the shares and interests which they are to take under the appointment, are made contingent upon a future event, provided the contingency must happen within the period prescribed by the rules relating to perpetuities; and if the fund is appointed not entirely to objects of the power, but partly to strangers, it will be still valid *quoad* those who are the objects of the power, and the appointment will fail only as to those persons who are not objects of the power. Applying that rule to the case now before me, as the appointment made (by this part of the will of Mrs. *Morrison*) is so made that the persons who according to its construction are to take under it, and the shares they are to take must necessarily be ascertained, and the interests vested, at the death of Mr. *Morrison*, who was alive at the date of the settlement creating the power, the appointment is therefore perfectly valid *quoad* the shares or interests which are thereby appointed to persons coming within the class designated by the power; but it is of course invalid so far as it appoints shares to persons not coming within that class.

I have hitherto considered only the first part of this appointment without reference to those subsequent clauses in which the testatrix attempts to tie up and settle the shares which are appointed to the niece, by the prior portion of that will; and I now proceed to consider the effect of those subsequent clauses.

The testatrix, having made this appointment of shares to these persons answering a certain description, directs that the share of each niece shall be placed out at interest by her executors, and the income of the shares

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paid to her niece for her life, for her separate use. And as to the particular niece, *Caroline Onley*, her share is to go at her death to all the testatrix's other nieces who should be then living, and the issue of such of them as shall be then dead, share and share alike, the issue taking only the parent's share. That applies only to the share of *Caroline Onley*; then as to each of the other nieces, she directs that after the death of the niece the interest of her share shall be paid to her husband during his life, and after the death of the niece and her husband, then her share is to go to the child, children, or grandchildren, or any other relation in blood of the niece, in such parts and proportions, manner and form, as the niece shall by will appoint, and in default of appointment then to the next of kin in blood of the deceased, according to the Statute of Distribution.

Now, in this attempted restriction and limitation, the direction for the payment of the income of the share to the niece, for her separate use during her life, is perfectly unobjectionable. Passing by for a moment the directions given as to the share of *Caroline Onley*, the limitations to the husbands of the other nieces are invalid, because they are not objects of the power, they are strangers, and this limitation in favour of the children and grandchildren, or other relations in blood of the nieces, and the limitations in favour of the next of kin, are, in my opinion, all void for remoteness, because, it would not, or at least it might not, be possible to ascertain who would take under those limitations within the period of a life or lives in being at the date of the settlement creating the power, and twenty-one years afterwards. With respect to the direction as to *Caroline Onley's* share, viz. that that share shall, upon her death, go over to the other nieces or their issue, I am of opinion that

all the directions contained in this part of the will were intended to apply only to the share which any niece would actually take, would actually become entitled to, under the prior appointment; so that if *Caroline Onley*, by surviving Mr. *Morrison*, had become entitled to a share, this direction would have applied to her share; but, as she never became entitled to any share at all under the prior appointment, this direction as to her share cannot take effect but in accordance with the prior provision, her issue are appointees in her place. It will be recollected that, by the prior appointment as to every share, including *Caroline Onley's*, that is, not excepting *Caroline Onley's*, if the niece is not living at the death of Mr. *Morrison*, the issue of the niece are specified. That was the case with *Caroline Onley*. She was not living at the death of Mr. *Morrison*; her issue are specified, and they are the actual appointees by virtue of the prior appointment. I am of opinion, therefore, that this direction as to *Caroline Onley's* share is inapplicable, by reason that *Caroline Onley* never had a share. Then the attempted limitations in the settlement of the shares of the nieces being invalid, excepting only the direction as to the shares being in trust for their separate use respectively, but the limitations after their deaths being invalid, it is contended, on the part of the next of kin, that the nieces who were living at the death of Mr. *Morrison* are only entitled to a life interest in these respective shares, and that, subject to such life interest, each of those shares is unappointed; that is, that the attempt so to limit them over is void, and therefore that those shares, after the death of each niece, are unappointed, and will go to the next of kin of Mr. *Morrison*, as in default of appointment. Now, upon the authority of *Carver v. Bowles* and *Kampff v. Jones*, both of which cases have been cited at the bar, I am clearly of opinion

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that, under the prior clause of appointment, a clause of definite and precise appointment of shares, each niece living at Mr. *Morrison's* death took an absolute interest in the share appointed to her, and that the attempt made by the testatrix to settle such shares having failed, the absolute interest of the niece remains unaffected, except to the extent that during her life the share is to be held in trust for her separate use.

A subordinate question arises with respect to *Charles* and *Louisa Day*. It can hardly be called a question, but it is necessary to state what, in my opinion, is the fact with respect to those two persons. Those two persons, *Charles* and *Louisa Day*, it will be recollected, are specifically named as appointees in the prior clause. They were children of a niece of the testatrix, who had died before the date of the will. Now, at the death of Mr. *Morrison*, at which time the appointment is to take effect, *Charles*, one of the two *Days*, was living, but *Louisa*, as I have stated, who had married Mr. *Blake*, had died, leaving an infant child, *Henry Blake*, who was living at the death of Mr. *Morrison*, and is still living. Now, by an express direction in the will, *Charles* and *Louisa Day* were only to take between them the share which their mother, Mrs. *Day*, the deceased niece of the testatrix, would have taken if she had been living. If she had been living, she would have been one of the daughters of *John*, who would have taken under the appointment, and therefore they are to take the share only between them that their mother would have taken. That is, each is to take only half a share. Then *Louisa*, that is, Mrs. *Blake*, having died before Mr. *Morrison*, according to the intention of the testatrix expressed, her child would take her share, that is, her half share; but the child of Mrs. *Blake* is incapa-

ble of taking, not being alive at the time of the death of the testatrix, and therefore that half share, as unappointed, goes to the next of kin in default of appointment, and *Charles Day* of course takes his half share as well appointed.

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The practical result then of the whole will be this:—The property must be divided into ten equal shares; one of such tenth shares is well appointed to each of the six daughters of *John Harvey*, and the one daughter of *Charles Onley*, who survived Mr. *Morrison*; another of such tenth shares is appointed, as to one moiety, to *Charles Day*, and as to the other moiety it is attempted to be appointed to the child of Mrs. *Blake*; such appointment is valid as to the former moiety appointed to *Charles Day*, and invalid as to the latter moiety. Another of such tenth shares is appointed, or attempted to be appointed, to the five children of *Caroline Onley*, in equal shares. Such appointment of that tenth share is valid as to three of those children, that is, the two who were born before the testatrix's death, and the one who was *en ventre sa mère*, and invalid as to the two others who were born after the testatrix's death; so that as to three-fifths of that tenth share, they are well appointed, and two-fifths of that tenth share are unappointed. That disposes of nine of the tenths. The remaining tenth share is well appointed to the five children of Mrs. *Herring*, the deceased daughter of *Charles*, in equal shares, all of those children being alive at the death of the testatrix. So that that which is unappointed, and will go to the next of kin in default of appointment, will be one moiety of a tenth share, and two-fifth parts of another tenth share, and that I believe disposes of the whole of the case.

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Mr. *Bacon* referred to the gift to "*Charles Day* and *Louisa Day*, the children of my deceased niece, and the two daughters of my said brother, *Charles Savill Onley*, or to such of them as shall be living at my husband's death," and asked whether the Court had considered, with regard to this gift, the question of joint-tenancy.

The VICE-CHANCELLOR said he had not overlooked it; he thought it was not a joint-tenancy, because the two *Days* were among the persons in whose favour the appointment was made in the first instance. It is made in these terms: "I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue," and so on, "unto and amongst all and every the daughters of my said brother, *John Harvey*, and the said *Charles Day* and *Louisa Day*, the children of my deceased niece, and the two daughters of my said brother, *Charles Savill Onley*, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided among them, share and share alike. But it is my will that the said *Charles Day* and *Louisa Day*, and the children of any other of my nieces who may be dead, shall only take their parent's share." His Honor thought it clear that the words *share and share alike* applied not only to the issue, but to all the daughters of *John*, to the *Days*, and to the two daughters of *Charles*; otherwise there would be a joint-tenancy among all the daughters of *John*.

With reference to the children of *Caroline Onley*, it was, after the judgment had been delivered, pointed out that there were only four, and that one of those four was born after the death of the testatrix, and died before the death of Mr. *Morrison*; and the Vice-Chancellor was of

opinion that that child did not take an interest. The effect therefore was that the tenth share, which would have been *Caroline Onley's*, if she had survived Mr. *Morrison*, was divisible into fourths, and the appointment would be valid as to three-fourths of that tenth in favour of the three children living at the death of Mr. *Morrison*, and inoperative as to the other fourth.

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ANDERSON v. NOBLE*.

THIS was a motion by the Defendant in equity for payment of money recovered by him in an action at law, or in default that the common injunction obtained against him might be dissolved. The Defendant in equity had not put in his answer, being abroad, and the motion was made upon the affidavit of his attorney's clerk, rebutting the equity alleged by the bill. The material facts are stated in the judgment.

Mr. *Cairns*, for the Defendant in equity, was about to open the motion upon the affidavit.

Mr. *Roxburgh* objected that an affidavit could not be

* The reporter has not thought it right to omit this case, notwithstanding the abolition of the *common* injunction by the 15 & 16 Vict. c. 86, and the 45th Order of the 7th August 1852, as it is difficult to say that the principles on which it is decided may not be still applicable to cases arising under the Act.

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11th March.

Practice.
Dissolving In-
junction against
Proceedings at
Law.

Where a Plaintiff at law being abroad has recovered judgment in the action, and the Defendant at law files his bill for an account and injunction, and obtains the common injunction, if the Court sees, on a motion to dissolve the injunction upon affidavit before answer, that there has been culpable delay

on the part of the Plaintiff in equity, he will be ordered to pay the money recovered into Court, or the injunction will be dissolved, whether the bill was filed before or after verdict.

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received to dissolve a common injunction, but the motion can only be made on the answer.

Mr. *Cairns* on this point cited 2 *Dan. Prac.* 1485, to show that when a Plaintiff at law is abroad, and there is a common injunction against him, the practice is to apply upon affidavit that the money recovered in the action may be paid into Court, or that in default the common injunction may be dissolved. He cited also *Acton v. Market* (a), *Coglan v. Requeneau* (b). On the merits he relied on an affidavit filed by the clerk of the attorney of the Plaintiff at law. The result of the evidence showed that there were reasonable grounds to doubt the equity of the bill. The bill itself did not distinctly allege a case that the Defendant in equity was in the wrong, or any knowledge or even belief that there were any improper charges in the account on which the action had been brought. The Plaintiff said in the bill that he *became aware some years ago* that there were unfair charges, but he did not allege his belief of that fact at the time the bill was filed. The learned counsel said the Plaintiff had all the knowledge now possessed by him when the action commenced; he had it in his power at the trial to prove the fraud of the Plaintiff at law, if fraud there was; but he would not even cross-examine the Plaintiff's witnesses. He did not file his bill till the action had actually come on for trial.

Mr. *Roxburgh* for the Plaintiff.

In every one of the cases cited the application was when the bill was filed after *verdict*. There is no case of any such application, except where the bill is filed after verdict, and here it was not filed after verdict.

(a) 2 Br. C. C. 14.

(b) 2 Br. C. C. 182.

There is no case such as those cited, since 1772, and they carry the practice only to this extent, that if a Plaintiff shows by his bill that a verdict has been obtained, and obtains the common injunction, the Defendant being abroad, the Defendant may, upon affidavit and before answer, dissolve the injunction unless the money is brought into Court. On the merits, the only evidence is that of the clerk of the attorney of the Plaintiff at law, and he swears only to information and belief.

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Mr. Cairns, in reply.

In *Potts v. Butler* and *Acton v. Market*, it would seem that the verdict had not been obtained. But there is no such distinction as that contended for; the principle of the cases does not depend on the question whether the bill is filed before or after the verdict, but on this, that where the Defendant is abroad and cannot therefore put in an answer for some considerable time, he is entitled to have the fruit of his verdict secured.

The VICE-CHANCELLOR :

I have no doubt in this case. The ordinary course is, that if a person brings an action at law against another, the Defendant in the action has a right to file a bill to restrain the action if it is brought for matter of account, or for that which is the result of an account; for although a Court of law has jurisdiction to entertain an action for matter of account, yet it is so much more convenient to take an account in a Court of equity, that the Defendant at law has a right to ask a Court of equity to have the account there taken, and to give him an injunction to restrain execution in the action, until the account has been taken. Or, he may apply to stay trial until the Defendant has put in his answer, in order that when the trial takes place the Defendant at

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law may have discovery. This is the common course of practice ; and then, if the Defendant in equity wishes to dissolve the injunction, he must put in his answer, and when he has done so he must obtain the common order nisi ; and then, unless cause is shown, he makes that order absolute. But the Court felt long ago, that when the Plaintiff at law is abroad, the Defendant at law might take advantage of that circumstance in order to delay the recovery of a just debt ; and by coming to this Court and filing a bill after a verdict, after he had taken advantage of every defence he could make at law, he might get the common injunction, and then, as the answer could not be put in perhaps for a long time, the Plaintiff in equity would obtain the benefit of that additional delay. The Court saw the mischief of this practice, and in the cases referred to, all of which were cases in which the bill was filed after verdict, the Court said justice requires this : when you are filing a bill against a Plaintiff at law who is abroad, and you ask to have substituted service of subpoena on the attorney of the Plaintiff in the action, you must have an affidavit of merits, and without that you cannot have substituted service. But that was found not to be enough when the Defendant in equity was abroad ; he might apply to this Court, and say to the Plaintiff, either pay into Court the money recovered at law, or let the injunction be dissolved. The mischief against which the practice was applied was undoubted, and it would have been a gross abuse and denial of justice if the Court had refused to exercise such a jurisdiction. That then was the settled practice, and I have no doubt that practice still subsists. It has been objected, that there is no modern case in which it has been exercised. But are there any modern cases in which the Court has refused to exercise it ! The reason that no such cases are to be found, is no doubt

this; that the practice was taken to be settled. I have no doubt whatever that the practice still subsists, and if it did not, it ought now to be established. The want of such a practice would cause a gross abuse of justice under the form of justice.

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Now what are the facts of this case? The bill was filed, not, it is true, after verdict, but it was filed on the very same day on which the trial took place. And under what circumstances? The action was brought on the 6th of October, 1849: on that day the summons was delivered. The declaration was delivered on the 3rd November. From that day down to the 19th January, 1852, when the cause was tried, the Plaintiff in equity knew what case was made against him, and what was his defence. He put in his pleas, and issue was joined on the 25th February, 1850; and what then took place? First, The Defendant at law obtained a commission to examine a witness at *San Francisco*; on the 13th April, 1850, a copy of the interrogatories was delivered; more than two months after that, viz. on the 9th July, 1850, further interrogatories were delivered. In the mean time the Plaintiff at law obtained his commission to examine his witnesses. His interrogatories were handed to the Defendant at law on the 21st May, and application was made to the Defendant to know whether he would cross-examine the Plaintiff's witnesses. On the 4th June his attorney declined to do so. The Plaintiff's commission was duly executed, and returned in October, 1850. What was done with the commission to *San Francisco* does not appear. Whether the Defendant at law abandoned it is not shown; but on the 10th January, 1851, that is, nine months after the first commission to *San Francisco*, the Defendant at law obtained a second commission to *San Francisco* to examine the same witness. From that to November, 1851,

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nothing appears to have been done, and on the 21st November, 1851, that is, two years after the declaration, notice of trial was given. The next thing was, that on the 25th November the Defendant at law took out a summons for leave to inspect *Noble's* documents, and for stay of proceedings in the mean time; but the Judge saw that this was merely for delay, and refused the application, and, as I think, justly. On the 28th November the Defendant at law took out another summons for leave to examine *Noble* on interrogatories, and that was refused. The Defendant then, on the 29th November, took out another summons to put off the trial until the return of his second commission from *San Francisco*. Instead of appearing in support of this summons, the Defendant at law abandoned it, from which it must be concluded either that he did not want the return to the commission, or did not want to put off the trial. On the 9th December the cause was called on, and would have come on but for the absence of counsel. The Defendant at law then applied for another summons for leave to examine *Noble*, and that application was also refused. On the 9th January, 1852, notice of trial was again given, and then the Defendant at law applied to the full Court for leave to examine *Noble* on interrogatories. On the 12th the application was refused, and the Court expressed an opinion, in which I fully concur, that it was made for delay. On the 19th the cause was tried, and a verdict returned. The Plaintiff proved his case by the very witnesses whom the Defendant had refused to cross-examine. A verdict for about 3000*l.* for debt and costs was returned. On the same day the bill was filed; and on the same day also the Plaintiff in equity applied for leave to substitute service, and filed an affidavit in support of his application; and so rapid were the movements now of the Plaintiff in equity, that on the same day he filed

his bill, filed and obtained an office copy of his affidavit, got the order of the Court, and served subpoena on the Defendant's solicitor. Now if he had done all this on the 20th, it is admitted the practice laid down by the cases would have applied ; but it is said, that having done it on the day on which the verdict was given, the practice was not applicable. Now, is a party to be permitted to delay for two years, and then, having availed himself of every defence at law, to have a bill ready on the very day of trial, and then to say the practice referred to does not apply, though, if twenty-four hours had elapsed, it is admitted that it would? Finding as I do the practice existing, considering it as applicable to this case as to any of those referred to, I think if there were no more in the case, it ought to be applied, to prevent an abuse of the proceedings of this Court. But there is more in the case ; the bill properly stating that the account between the parties, if taken, would show a different result from that of the trial at law, and that, upon taking such account, no balance, or a very small balance, or at any rate much less than the sum recovered by the verdict, would appear to be due, and the Plaintiff having to verify the merits of his bill, properly but most cautiously abstains from alleging either his knowledge or belief that the whole of the 3000*l.* is not due ;—he does not say that the sum recovered is one farthing more than is due, but all that he says is, that some time in 1848 *he became* aware that there was some incorrectness in the charge made to him in the Defendant's accounts ; but he does not allege that now he has any knowledge or even belief of any such incorrectness, and certainly he does not state or refer to any particulars of improper charge. If ever there was a case in which an attempt was made to interpose every delay at law, and then, all that having been exhausted, by bill, to use the process of this Court to delay the pay-

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ment of a just demand, this is that case. I have no hesitation in applying the practice laid down in the cases which have been referred to. Even if the bill had been filed a short time before the verdict, the practice would, I think, be applicable.

The order was, that the Plaintiff in equity should be at liberty within three weeks to pay the sum mentioned in the notice of motion into court, to the credit of the cause, and in default of payment, that the injunction should be dissolved.

BROUGHAM v. SQUIRE.

1852 :
26th June.

ANDREW LYNCH was, in 1843, the owner of three policies of assurance, for 1000*l.*, 2000*l.*, and 2000*l.*, effected in the Law Life Assurance Office on the life of one *James Joyes*, of *Galway*, in *Ireland*, subject to certain claims thereon of *W. Witham*, who was one of the Defendants.

*Deeds,
Construction of
Rectifying.*

Being unable to keep up the policies, he applied to the Plaintiff to assist him, and an arrangement was

A., being the holder of several policies of insurance on the life of *B.*, and being unable to keep them up, entered into an agreement

with *C.* for the purpose of *C.* keeping them up. The agreement consisted of three instruments : first, a letter, by which it was stated that *C.* was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond, and an equitable mortgage of certain estates. No time was specified for the repayment of the advances and interest. Secondly, a bond for 6000*l.*, referring to the letter, for repaying the advances and interest *at the expiration of six months from the death of B.* Thirdly, an agreement, also referring to the letter and to the deposit of the policies to secure the payment of the advances and interest *at the expiration of six calendar months from the death of B.*, by which agreement the advances and interest were secured to be paid at six months after the death of *B.*, upon certain estates.

A. died, living *B.*, leaving a considerable amount of advances and interest unpaid, and having before his death assigned the policies to trustees, for his creditors. *C.* now filed his bill, claiming to have all his advances and interest paid, and that the agreement might be varied, and made to conform to the letter, and that, if necessary, the policies might be sold.

Held, first, that, upon the true construction of the three instruments, *C.* had no security on the policies available till after the expiration of six months from the death of *B.*

Secondly, that the agreement could not be rectified, there being nothing to rectify it by, except the letter itself, the letter and agreement being incorporated in effect into one instrument, and the letter not specifically pointing out the time when the security was to be available.

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come to which produced the following letter from *Lynch* to the Plaintiff:—

“Dear Sir,

“*London*, 3rd July, 1843.

“The following is, I think, the basis of our arrangement:—The policies for 2000*l.* each, and the policy for 1000*l.*, all in the Law Life Office, in the name of *James Joyes*, of the town of *Galway* in *Ireland*, to be deposited with Messrs. *Bouverie & Co.* of *London*, bankers, together with my bond, in the penal sum of 6000*l.*, to secure what may be advanced from time to time by you, your executors, administrators, or assigns, with interest at 5*l.* per cent. and an equitable mortgage in writing on my *Lydigan* estate in the county of *Galway* (not to be registered). On the above security, you, your executors, administrators, and assigns are to advance, from time to time, the premiums to become payable on the above-mentioned three policies, during the life of the said *James Joyes*.

“I remain, sir, yours truly,

“*A. H. Lynch.*”

At the foot of the letter was written an acceptance of the terms, which was signed by the Plaintiff, and was in the words, “I accept the above arrangement, and hereby undertake to fulfil the same on my part. Signed, *W. Brougham*. Witness, *Thomas Burningham*.” On the 3rd of July, 1843, a bond was duly executed by *Lynch*, which was as follows:—“Know all men by these presents, that I, *Andrew Henry Lynch* of *Queen-square, Bloomsbury*, in the county of *Middlesex*, Esq., am held and firmly bound to *William Brougham* of *Grosvenor-square*, in the county of *Middlesex*, Esq., in the penal sum of 6000*l.*, in good and lawful money of *Great Britain*, to be paid to the said *William Brougham* or

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his certain attorney, executors, administrators, or assigns. For which payment to be well and faithfully made, I bind myself, my heirs, executors, and administrators, and every of them firmly by these presents. Sealed with my seal. Dated this third day of July, &c., and in the year of our Lord 1843. Whereas the above-bounden *Andrew Henry Lynch*, and the above-named *William Brougham*, have mutually entered into the agreement contained in the letter written on the third side of this bond, addressed by the said *Andrew Henry Lynch* to the said *William Brougham*, and accepted by him: Now the condition of the above-written bond or obligation is such, that if the said *Andrew Henry Lynch*, his heirs, executors, and administrators, shall and do well and truly pay or cause to be paid to the said *William Brougham*, his executors, administrators, or assigns, all and singular the several sums of money to be advanced by the said *William Brougham*, his executors, administrators, or assigns, in payment of the premiums on the three several policies of insurance (mentioned in the letter above referred to), in pursuance of the said agreement so entered into as aforesaid (but not exceeding the sum of 3000*l.*), together with interest at 5*l.* per cent. on the said several sums from the respective times of their being advanced, at the expiration of six calendar months after the decease of *James Joyes*, mentioned in the said letter, then the above-written bond or obligation to be void, or otherwise to remain in full force and virtue."

The letter alluded to in the bond, and which was written thereon, was the letter above set out, bearing date the 3rd day of July, 1843. As a further security to the Plaintiff, the Defendant, *William Witham*, prepared an agreement bearing date the same 3rd day of July,

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1843, which was afterwards signed by the Plaintiff and by *Andrew Henry Lynch*, and was as follows:—

“An agreement made between *Andrew Henry Lynch*, Esq., of the one part, and *William Brougham*, Esq., of the other part. Whereas the said *Andrew Henry Lynch* and *William Brougham* have mutually entered into an agreement contained in the following letter, addressed by the said *Andrew Henry Lynch* to the said *William Brougham*, and accepted by him, the said *William Brougham*, viz.”

(The instrument here recited the letter set out in p. 152, and the Plaintiff's acceptance of its terms, and proceeded):

“And whereas the said three policies of insurance have been accordingly deposited with the said Messrs. *Bouverie & Co.*, and the said *A. H. Lynch* has given his bond or obligation in writing, bearing even date herewith, in the penal sum of 6000*l.*, with a condition thereunder written for making void the same on payment by the said *A. H. Lynch*, his heirs, executors, or administrators to the said *William Brougham*, his executors, administrators, or assigns, of all and singular the several sums of money to be advanced by the said *William Brougham*, his executors, administrators, and assigns, in payment of the premiums on the said three several policies of insurance (mentioned in the said letter), with interest at 5*l.* per cent. from the respective times of their being advanced, at the expiration of six calendar months after the decease of the said *James Joyes*. Now, therefore, these presents witness, and the said *Andrew Henry Lynch*, in consideration of the undertaking of the said *William Brougham*, contained in the said re-

cited agreement, doth hereby agree to charge his *Lydigan* estates, situate in the county of *Galway*, in *Ireland*, with the several sums of money to be advanced by the said *William Brougham*, his executors, administrators, or assigns, in payment of the premiums of the said three several policies of insurance, during the lifetime of the said *James Joyes*, as aforesaid, together with interest at 5l. per cent. from the respective times of such several sums of money being advanced, such several sums and interest so charged as aforesaid to be paid at the expiration of six calendar months after the death of the said *James Joyes*, the said policies of insurance to be the primary security ; and the said bond and this charge to be the secondary security for the same, and, subject thereto, the said policies are to be held by the said Messrs. *Bouverie & Co.*, in trust for the said *Andrew Henry Lynch*, his executors, administrators, and assigns. And the said *Andrew Henry Lynch* doth hereby agree, at his own expense, to execute a legal mortgage of the said estates for the purpose aforesaid, when thereunto required by the said *William Brougham*, his executors, administrators, or assigns."

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As a further security for the repayment of all monies to be advanced by the Plaintiff, according to the agreement entered into as aforesaid, *Andrew Henry Lynch* duly executed a deed poll, bearing date the 1st day of August, 1843, purporting to be an assignment to the Plaintiff of the policy numbered 8999, upon the trusts mentioned in the agreement dated the 3rd day of July. By another deed poll, bearing date the same 1st day of August, 1843, and which was to the same purport and effect, and, with a few exceptions, in the same words, as the previously stated deed-poll of the same date, the policy No. 3874 for 2000l. was assigned by the De-

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defendant *William Witham* (who had a prior claim thereon), and *Andrew Henry Lynch*, to the Plaintiff absolutely, upon the trusts of the said agreement of the 3rd day of July, 1843. As a further security for the repayment to the Plaintiff of such advances so to be made by him on account of the premiums from time to time to become due upon the said policies, the policy No. 4171, for 2000*l.* was by a deed bearing date the 7th day of October, 1843, assigned by *Andrew Henry Lynch*, and the Defendant *William Witham* (who was therein declared to be a trustee of the said policy for the said *Andrew Henry Lynch*), to the Plaintiff absolutely, to be held by him upon the trusts declared in and by the said agreement of the said 3rd day of July, 1843.

The Plaintiff duly paid the premiums, and it seems, though it was not clear, that till February, 1846, *Lynch* duly paid interest. On the 13th of February, 1847, another year's interest upon the payments and advances so made by the Plaintiff became due, but *Andrew Henry Lynch* was then unable to pay such interest, and he requested the Plaintiff to allow him time to pay the said interest, which the Plaintiff consented to, upon the statement then made to him by *Andrew Henry Lynch*, that he hoped shortly to be able to pay the interest. In the beginning of the month of April, 1847, the Plaintiff received a letter in the handwriting of the wife of *Andrew Henry Lynch*, which was signed in his name, the said *Andrew Henry Lynch* being unable, from paralytic affection, to write himself, and such letter was as follows:—

“*Boulogne-sur-mer*, 30th March.

“ My dear *Brougham*,

“ It was a great subject of regret to me that you were not able to come to me the day before I left. I

thought I should have had the satisfaction of at least bidding you farewell. I little thought the last time I saw you of what would happen ; I trust, however, you will not suspect me of saying what I did not intend, when I said I would pay the interest on the money advanced by you on the policies for the last year. They will now, I suppose, become the property of another, but it is a great consolation to me that you must be paid all the money advanced by you, and interest. It is a great pity they must be so sacrificed. I have only now to thank you for all your kindness to me, which I shall ever remember." The letter contained some further expressions immaterial to the present case.

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In the beginning of the month of April, 1847, and about the time at which he received the above letter from *Andrew Henry Lynch*, the Plaintiff was served with a notice, which was of the date and in the words following:—

"To *William Brougham*, Esq.

"Take notice, that, by an indenture dated the 26th day of March instant, and made between *A. H. Lynch* of the first part, *John Squire*, *Richard Williams*, *Frederick Squire*, and the Honourable *Arthur Kinnaird*, and the several other persons creditors of said *A. H. Lynch*, who had subscribed, or who should subscribe their names, and affixed or should affix their seals thereto, of the second part, and the said *Frederick Squire* and *Henry Stonor* of the third part, the said *A. H. Lynch* did assign (among other things) all the policies of insurance on the lives of himself and *James Joyes*, and all the monies to become payable thereon (subject to the charges thereon respectively), unto the said *Frederick Squire* and *Henry Stonor*, their executors, administrators, and as-

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signs, upon the trusts therein mentioned, for the benefit of his creditors.

" Dated this 29th day of March 1847.

" *Powell, F. & W. Broderip, and Wilde,*
" Solicitors for the Trustees."

Andrew Henry Lynch died shortly before the filing of the bill. The prayer of the bill was as follows :—

That, it might be declared that, under or by virtue of the said agreement, bearing date the 3rd day of July, 1843, Plaintiff was entitled to the annual payment of interest after the rate of 5l. per cent. per annum, upon all sums which have been hitherto advanced, and might thereafter be advanced by him in payment of the premiums which had become due, and might thereafter become due upon the said policies. And that the said agreement of the 3rd day of July, 1843, might be varied for that purpose, in conformity with the terms of the said letter of the 3rd day of July, 1843, and the clear intention and understanding of and between Plaintiff and the said *A. H. Lynch*, Plaintiff thereby offering, upon such variation being made, to perform the said agreement on his part ; For an account ; And that, if necessary, the said policies, or some or one or them, might be sold by and under the decree of the Court. And that, out of the proceeds of such sale, Plaintiff might be paid what should be found due or what should thereafter become due to him. And that the said agreement and bond, bearing date respectively the 3rd day of July, 1843, and the said assignments, bearing date respectively the 1st day of August, 1843, and the 7th day of October, 1843, might be delivered up to be cancelled.

The cause now came on to be heard.

Mr. *Malins* and Mr. *Erskine* for the Plaintiff.

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The Plaintiff *Brougham* has paid the premiums from 1843 down to the present time. He is not obliged, as the Defendants will contend, to continue paying the premiums; but if he is, he is also entitled to interest from time to time upon his advances. What we ask is, that the policies should be sold to repay the Plaintiff what he has advanced; or that the bond may be reformed according to the intention of the parties, which was clearly that the Plaintiff should have interest regularly. *Squire* and *Stonor*, who are the trustees of the assignment of *Lynch's* property, admit that it was his intention that interest should be paid regularly (their answer stated their belief to that effect), and that is the condition of the letter; the bond and the agreement go beyond that, and ought to be rectified.

Mr. *Glasse* and Mr. *Witham*, for the Defendant *Witham*.

The only equity which by any possibility the Plaintiff can have, is to have the instruments rectified, and that he fails in establishing. There is no proof that *Lynch* agreed or intended to pay interest. The language of the letter is ambiguous; but that of the bond and agreement puts a construction upon it, and shows clearly that no interest was to be paid till after the death of *Joyes*. The policies are not securities for the payment of premiums or interest till after the death of *Joyes*, and cannot be sold to recoup the Plaintiff as against others having also charges upon them.

Mr. *Toller* for the trustees of Mr. *Lynch's* assignment.

Mr. *Malins*, in reply.

The intention of both parties was clearly that

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Brougham should make advances from time to time, and the interest on such advances was to be paid; that is, paid as interest usually is, yearly or half-yearly. He referred to the letter of the 30th March for the purpose of showing that *Lynch* had in view such a payment of interest.

THE VICE-CHANCELLOR :

The questions in this case are two. First, what is the construction of the instruments as they stand? Secondly, whether, if the construction is not in favour of the Plaintiff, he may have the instruments rectified? On the construction of the instruments, I may observe that it is impossible to imagine any transaction more unusual. There are three principal instruments all dated on the same day, constituting in effect one transaction. The first document is the letter from Mr. *Lynch* to Mr. *Brougham*. [His Honor read the letter set out in p. 152, and proceeded:] And at the bottom is this memorandum: "I accept the above arrangements, and undertake to fulfil the same on my part.

(Signed) *W. Brougham.*"

This document is written on the third page of the sheet of paper on which the bond is written. Then comes the bond with a penalty of 6000*l*. [His Honor read the material parts of the bond.]

The third document (treating the letter and the memorandum as one) is the agreement between Mr. *Lynch* and Mr. *Brougham*. [His Honor referred to the terms of the agreement set out in p. 154.] This agreement expressly states that such sums are to

be paid at the expiration of *six calendar months* after the death of *James Joyes*. These are the documents on which the question turns. There are others, instruments by which the policy was assigned to Mr. *Brougham*, but they are not material for the purpose of this case. As to these three instruments, the question arising in this case upon their true construction is not, whether Mr. *Brougham* can be compelled to keep up the premiums ; nor the liability of Mr. *Lynch* or his assets to pay the debt ; nor the right of his representatives to compel payment of the premiums ; but the right of the Plaintiff Mr. *Brougham*, arising out of the deposit of the securities, to deal with the policies themselves. The Plaintiff says his right is to sell the securities deposited with him, at least for the payment of the interest, and, indeed for that of the principal also ; and the question is, whether that is the true construction of the documents. Now, firstly, as to the letter of the 3rd July : that states that the policies and bond shall be deposited with Messrs. *Bouverie*, to secure the advances made by Mr. *Brougham*, with interest at 5 per cent., and on that security the letter says Mr. *Brougham* is to advance the premiums. Mr. *Brougham* accepts that arrangement, and undertakes to fulfil it, and all that he had to do was to pay the premiums during the life of *Joyes*. If the matter stood there, and nothing more had been done, I am not prepared to say, that, as the interest of the sums advanced fell due, Mr. *Brougham* might not have had a right of action. Nothing is said as to the period of payment ; but, even on this document, the obvious purpose, both of Mr. *Lynch* and of Mr. *Brougham*, was, to prevent the policies being sacrificed, to keep them on foot, so that *Lynch* might have the full benefit of the policies whenever, by the death of *Joyes*, the money should become payable. It is clear that that was the intention of both parties. Now on the same day on

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which *Lynch* wrote that letter, the other instruments were prepared. The bond in express terms refers to that letter, and stipulates that it is given to secure the advances and interest at the *expiration of six calendar months* after the death of *Joyes*. The agreement recites the letter and the bond, and particularly the part postponing the liability to pay, and then stipulates that the mortgage is to secure the premiums and interest, specifying the period of payment at the expiration of six calendar months after the death of *Joyes*. Whether there was any obligation on Mr. *Brougham* to keep up the premiums—whether he had any right against *Lynch* personally, in respect of the interest,—he has no security on the policy for the return, either of the premiums or the interest, except within six months after the death of *Joyes*; and if this were the whole case, he would have no right to have the policy sold.

Then as to the other question, whether the Plaintiff has a right to have the bond and agreement rectified. When a party wishes to rectify an agreement one rule is plain: he must have some draft or some evidence of the intention by which to rectify; and the question here is, whether there are any materials by which to rectify. If these instruments do not express the intention of the parties, how am I to ascertain their intention? The only mention of the payment of interest is to be found in the instruments themselves; and so far as it is in evidence, there is the fact of two payments by *Lynch* to *Brougham* in his lifetime. There is also the letter written by Mr. *Lynch*; with regard to the bearing of that letter, assuming that there is no technical difficulty in treating it as a letter from Mr. *Lynch*, it does not afford any available evidence. The period of the original transaction was 1843. The letter was written in March, 1847;

that can afford no indication of the intention of the parties in entering into the arrangements of 1843. The letter written after *Lynch* had quitted *England*, expresses his regret that he had failed to see Mr. *Brougham*; but before that he had seen him. (His Honor went into an examination of the language of the letter, and said he could not conclude from it anything which would bind Mr. *Lynch* himself, so as to show any intention to pay interest at any time during the life of *Joyes*.) As to the other circumstance—the payment of interest,—that appears consistent with the construction of the instruments. Mr. *Lynch* with great propriety might say, that although the purpose was to preserve the policies, and although they were to be considered as no security till the death of *Joyes*, still he, Mr. *Lynch*, might naturally desire to pay the interest, and Mr. *Brougham* might naturally expect it. If I am to rectify these instruments at all, it must be a rectification of the bond and agreement—not to make them agree with the letter of July; for that is silent as to the particular details of the security, except that it is to be inferred that the policies were not to be sold till the death of *Joyes*, for Mr. *Brougham* agrees to advance the premiums during the life of *Joyes*.—I have therefore nothing to rectify the instruments by, nothing to show that the intention of the parties is one way, and that the instruments have carried out the matter differently from the intention; on the contrary, not only is the whole one transaction, but the bond is written on the same paper as the very letter by which it is said I ought to rectify the instruments. Now in this state of things, having no better evidence, can I say that two of these instruments carry out an arrangement different from the intention, when there is nothing to show the intention but the legal instruments themselves? I am of opinion that I cannot

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decree rectification of any of the instruments, and as they stand, I think the construction is clear, that whether there is any liability in Mr. *Brougham* to pay the premiums, —whether he has any right of action or not against the representatives of Mr. *Lynch* — as regards his rights under the securities constituted by the deposit of the policies, his right does not extend to compel repayment of the premiums or interest during the life of *Joyes*. Under these circumstances, I can make no other decree than to dismiss the bill ; and I must dismiss it with costs.

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THIS was a suit to administer the estate of *Mary Robinson*. It now came on upon exceptions to the Master's report, and the substantial question before the Court was, whether a certain bond given by one *Peter Knight*, to *Winifred Robinson*, *Jane Robinson*, and *Mary Robinson*, and which eventually became the property of *Mary Robinson*, was released at law, and if not, whether there was any equity against its being enforced.

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3rd and 5th
July.

Bond,
Release of,
Equity.

The real and personal estates of *Winifred Robinson*, *Jane Robinson*, and *Mary Robinson*, were conveyed and assigned by them, in 1830, to *Thomas Major* the elder, since deceased, and the Plaintiff, *Thomas Major* the younger, upon various trusts, which it is unnecessary to set out. The result of them was, that under

A. being indebted to *B.*, *C.*, and *D.*, three sisters, who were his near relations, partly on his own account and partly as executor of his father, executed to them a bond for 500*l.* At the time of the giving of the bond, *A.* objected to give it, and

agreed to do so, only on a verbal representation that it was not intended to be enforced unless *B.*, *C.*, and *D.* should come to want,—an event which did not happen. The bond remained in the hands of the three till the death of *B.*, and after her death, in the hands of the survivors, and after the death of *C.*, in the hands of *D.*, whose property (by mutual arrangements) it was at the time of her death. On the bond was found the following endorsement: "This bond is never to appear against *A.* Witness, *C.*, *D.*"

This was dated eleven years after the date of the bond.

It was not made clear that *C.*'s name was written by herself: it was said that *D.* had written it. It was, however, proved that if *D.* had written it, she did so with the authority of *C.*

Held, that, without saying whether the endorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate of *D.*

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mutual wills which the three sisters made, *Mary*, who was the survivor, became eventually entitled to the whole, and her will took effect on the whole, the bond in question included. *Peter Knight* was, on and before 1831, indebted to the Misses *Robinson*, on his own account, in a sum of 120*l.*, and as executor of his father, in a sum of 370*l.*; and the sisters pressing for some security, a bond was finally agreed to be given by him for 500*l.*, and the bond was executed on the 26th August. It was a common money bond, and on it was found endorsed, at the death of *Mary Robinson*, the following memorandum :—"This bond is never to appear against *Peter Knight*. Witness, *Mary Robinson, Jane Robinson*."

Winifred died in November, 1831. The signatures *Mary Robinson, Jane Robinson*, were apparently in the same handwriting, and it was said it was the handwriting of *Mary*; it was, however, sufficiently proved that if *Mary* signed for her sister, she did so with her concurrence and approval.

Peter Knight and his father were stated by the Misses *Robinson* to be their only relations. After the death of *Winifred Robinson*, no interest was ever required or paid by *Peter Knight* on the bond; but it remained in the hands of *Mary* and *Jane*, after the death of *Winifred*, till the death of *Jane*, and afterwards in the hands of *Mary*, till her death. The date of the endorsement was eleven years after the date of the bond, viz. in 1842; and as to the execution of the bond, it was proved that on the occasion of its being required and entered into, *Peter Knight* objected to it, and only yielded on a verbal representation that it was not intended the bond should be proceeded upon unless the Misses *Robinson* should come to want; they never did come to want, but all

died in easy circumstances. These are the material facts which appeared by the Master's report, and upon them he found that nothing was due upon the bond from *Peter Knight* to the estate of *Mary Robinson*; to this report the executor of *Mary Robinson* excepted.

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Mr. *Bacon* and Mr. *Flather*, for the exceptions, contended that the endorsement was no release at law; and if there was no release at law, there could be none in equity. There was no proof that *Jane* had authorized the memorandum; and in fact it was plain, upon inspection, that both signatures were in the same handwriting, and that was shown to be *Mary's*. It was a mere voluntary memorandum, and indicated no intention to give up the bond.

Mr. *Willcock*, (with whom was Mr. *Greene*.) for *Peter Knight*, in support of the Master's report, said the memorandum showed that the obligees considered the necessity for calling in the money as passed, and that they intended to release the bond: *Wekett v. Raby* (a). It is written on the bond, that it is not to be enforced; the endorsement is therefore a direction to the executor not to use it. The bond was originally delivered on the condition that it was only to be used if the ladies wanted the money, and to be abandoned if they did not want it; and the writing endorsed shows that the condition was satisfied. Indeed, we say it amounts to an actual legal release: *Aston v. Pye* (b). There, there was a condition, but here the discharge is absolute. *Mary Robinson* was the survivor, and she clearly signed; therefore, even if *Jane* did not sign the memorandum, it is immaterial, for the bond was in fact *Mary's*. But in fact, *Jane* did sign, or authorized *Mary* to sign for her.

(a) 2 Br. P. C. 386, Ed. Toml. (b) 5 Ves. 349, *notis*.

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(The *Vice-Chancellor* intimated, that if the case depended on the question of *Jane's* having signed, or if it were necessary to determine whether the endorsement operated as a release at law, that must be determined in an action.)

But there may be a release in equity, even if there is none at law: *Reeves v. Brymer* (a), where the Court sent the case to law, was different; in that case the Court thought there was no equity. Here there is a release in equity, which may be even without writing: *Flower v. Martin* (b), *Cross v. Sprigg* (c).

Mr. *Greene*.

The bond was originally given on the understanding that it was not to be enforced, except under given circumstances. The memorandum of 1842 shows that it was not intended then that it should ever be enforced. The debt was not wholly *Peter Knight's*, but, to the extent of 370*l.*, his father's. *Peter Knight* was only debtor in respect of his father's assets, to the extent of 370*l.*; that shows the probability of the ladies not intending to use the bond unless they should *come to want*, the expression proved to have been used by them. It has also been proved, that when the bond was given, it was agreed that *Knight* was not to be put to any expense in preparing it. That is found by the Master, and not excepted to, and that also shows the intention of bounty on the part of the ladies. Now the ladies did not come to want; that appears by the Master's report, and that finding is not excepted to. No interest has ever been paid, from 1831 down to the death of the testatrix in 1842;

(a) 6 Ves. 516.

(b) 2 McN. & Gord. 113.

(c) 6 Hare, 552,

that is found by the Master, and not excepted to. Now as to the signing of the memorandum: it is proved, by the evidence of the servant of the Misses *Robinson*, that they stated to her their intention that the bond should not be put in force; and then afterwards, the memorandum was found signed, as it appears now. The suit embraces only the account of *Mary's* estate, and she was the survivor. She is unquestionably bound, and her estate is the one entitled. She was the owner of the bond, and she died without having withdrawn her expression of intention manifested by the memorandum. In administering her estate as between volunteers,—and there are no creditors in the case,—her direction that the bond is not to be enforced cannot be disregarded.

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As to sending the question to law: when there is concurrent jurisdiction, this Court will determine the legal question itself. The Plaintiff might, at the hearing, have asked for an action; he has not, but has submitted himself to this jurisdiction: he cannot now repudiate it.

Mr. *Bacon* in reply.

It is not proved that *Jane Robinson* did sign the endorsement on the bond; on the contrary, it is tolerably clear that she did not. But it is said, that although *Jane* did not sign, *Mary* did, and that is enough; and that the endorsement operates as a release. No case has been referred to in which such a memorandum has been held a release. *Aston v. Pye* was a case of a promissory note: and satisfaction of a note may be much more easily presumed than release of a bond. It would be most unsafe to treat a bond as released by a writing

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purporting to be under the hands of two obligees, when it is clear that one of them did not sign it.

The VICE-CHANCELLOR :

This case involves two distinct questions : First, What is the effect of the endorsement on the bond, having the names of *Mary* and *Jane Robinson* subscribed to it, connected with the evidence relating to the endorsement ? Secondly, What are the circumstances which occurred when the bond was originally given ! and if the circumstances are proved, then what is the effect of them ! for the case might possibly be decided on the effect of the endorsement, as to the question whether it amounted to a discharge ; or it might be decided on the question, under what circumstances the bond was originally given. Now as to the effect of the endorsement on the bond, and the evidence relating to the circumstances under which it was made, certain facts are found by the Master, which I shall assume to be true, as the finding of the Master is not excepted to. Among other facts, the Master finds that *Winifred Robinson* and her sisters had often stated that *Peter Knight* and *T. Knight* were their only relations. To this finding there is no exception. Then there is another finding, to which there is no exception, to the effect that after the death of *Winifred*, *Peter Knight* never paid any interest on the bond. These facts I must take to be true. Then whether *Jane Robinson* signed the endorsement herself or not,—whether *Mary Robinson* wrote the name of *Jane Robinson* or not, either by her direction or by guiding her hand,—this fact is established, that the memorandum was put on the bond with the consent of *Jane* ; and she afterwards told the debtor what had been done.

Under these circumstances, the question whether the

memorandum on the bond operates as a release or discharge of the bond, or as a bar to the right of the executor to recover, appears to me to be a legal question. I cannot understand how, if the memorandum is not a bar at law, it can be a bar in equity. If the memorandum had been given for valuable consideration, it might be otherwise; being voluntary on the part of *Mary* and *Jane Robinson*, no benefit passing to them, I am at a loss to understand how, if the memorandum is not a bar at law, I can say it operates as an equitable discharge. If, then, the only question were that which depends on the effect of the endorsement, I do not see how I could avoid sending that question to law. But the second question is, whether, referring to the other matters arising at the creation of the bond, there is anything to induce me to say that, irrespectively of the question whether the indorsement operates as a release, the Court will hold it inequitable to allow the executor to recover on the bond. Now I must, for this purpose, look at the eighth exception, which goes to the finding as to the circumstances which took place at the time of the creation of the bond. Now the Master has found the facts on the evidence of *Mrs. Hart*, a disinterested, respectable, and credible witness, who deposes as to what took place in her presence. Her evidence is contradicted by that of the Plaintiff *Major*; that is, of a party not merely technically interested as Plaintiff, not merely as the representative of the supposed creditors of *Mary Robinson*, but one who is directly and beneficially interested. The Master has arrived, under these circumstances, at the conclusion that the evidence of *Mrs. Hart* should be adopted, as more to be relied on than that of *Major*.

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It has been argued before me, that I am bound to

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doubt *Major*, for reasons having nothing to do with his conduct in this matter, but with certain conduct in other matters, and particularly with his having been found guilty, in a totally distinct matter, of perjury. On this, I can only say that the facts are not before me, and I cannot assume them. Discarding, then, all these extraneous matters, I think the Master would be justified in doing what a jury would do, if Mrs. *Hart* had been examined on the one side, and *Major* on the other, before a jury. I think the jury would be justified in believing Mrs. *Hart*. The Master has arrived at the same conclusion; I agree with him, and therefore as to the facts found by him, depending on this evidence, I must assume them to be true. (The facts thus found were those already stated, relating to the circumstances under which *Peter Knight* originally executed the bond.) The Master finds also, that of what was owing from *Knight*, 370*l.* was due from him as executor of his father; that the bond was given by *Knight* after objection made by him, and a representation to him that it was not intended that he should pay the bond; that the money, being chiefly due from him as executor, and partly only on his own account, it was not intended it should be called for, except in case of the ladies coming to want; that to that representation he yielded, and that the bond was accordingly executed. Now these ladies did not come to want; on the contrary, they died in affluent circumstances. And then I find that eleven years after the bond was given, the endorsement was made on it with the assent of *Jane Robinson*, she and her sister *Mary* being then the surviving sisters, to the effect that the bond was not to appear against *Knight*. Now, in this view of the case, I am not called on to decide whether the endorsement amounted to a release or discharge of the bond, but only to decide this question, whether by the

effect of the circumstances attending the giving of the bond, there is an equity. Part, a large part indeed, of the money for which it was given was not due from *Knight* personally, but only in respect of the assets of his father; he and his father were near relations of these ladies, the parties to whom the money was to go; no interest was, it seems, ever demanded or ever paid; and after eleven years from the creation of the bond, this memorandum was indorsed on it by one of the surviving sisters, with, at least, the consent of the other. It appears to me that I have here not a legal but an equitable case; and the question is, whether, consistently with the authority of the case before the Lord Chancellor, and with *Cross v. Sprigg*, I can determine that if an action were brought against the bond debtor by the executor of *Mary Robinson*, I ought if a bill were filed to restrain that action, to grant an injunction. If I ought not to restrain that action, I ought not now to make any declaration, but to direct an action. But, as I am of opinion that if such an action were brought, I ought to grant an injunction, I am justified in coming to the conclusion that the Master is right, and that nothing is now due on the bond (a).

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(a) Some difficulty arose as to overruling some of the exceptions, on account of the particular mode in which the facts were found by the Master, and the consequent form of the exceptions. This, however, did not affect the substance of the decision, and the reporter has not thought it material further to notice them.]

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31st July.

Will,
Construction of.
Tenant for life
and remainder-
man.
Conversion.
Repairs.

A testator gave all his residuary real estate and his stock, mortgages, and securities for money, and all other his personal estate and effects to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which at the time of his death he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense.

Held, first, that the widow was entitled to the leaseholds in specie.

Secondly, that the repairs were to be borne by the residue, and not by the tenant for life.

HARRIS v. POYNER.

THIS was a suit for the administration of the estate of *William Poyner*. The Plaintiff, *A. F. Harris*, was the representative of the testator's son; the Defendants were *Sarah Poyner*, the testator's widow; and *Charles Harris*, the husband of the Plaintiff. *William Poyner*, the testator, after giving by his will certain specific chattels, proceeded thus:—And as to all that my freehold messuages or tenements, and premises, with the appurtenants, and situated in *Buckingham-street*, in the *Strand*, in the county of *Middlesex*. And as to all other my real estate, whatsoever and wheresoever; and likewise as to all my stock in the public funds of this kingdom; mortgages and securities for money, and all other my personal estate and effects, whatsoever and wheresoever, not hereinbefore by me disposed of, or wherein the whole and absolute interest is or are not hereinbefore by me disposed of, I give, devise, and bequeath the same and every part thereof, and all my estate, term, and interest therein, with their respective appurtenants, unto and to the use of my said dear wife the said *Sarah Poyner*, and my said only son the said *William S. Poyner*, my executrix and executor herein named and appointed, their heirs, executors, administrators, and assigns, according to the respective natures, tenures,

and qualities thereof, upon the trusts following ; that is to say, upon trust during the natural life of my said wife and her remaining my widow, to pay to or permit and suffer her to receive and take the net or clear rents, issues and profits, dividends and annual proceedings, and income of all my said devised freehold and residuary real and personal estate, as aforesaid, after paying all outgoings and expenses, and the aforesaid annuity or yearly sum of 100*l.* to my said son, by equal quarterly payments as aforesaid, for her absolute use ; and in case my said wife shall, after my decease, marry again, then upon trust, during the remainder of her natural life, to receive and pay the said net or clear rents and profits, interest, dividends, and annual proceeds and income of all my said devised, freehold and residuary, real and personal estate as aforesaid, after paying all outgoings and expenses, and the aforesaid annuity or yearly sum of 100*l.* to my said son as aforesaid, into the proper hands of my said wife for her separate use, independent of any husband with whom she may intermarry, and who shall not intermeddle therewith ; neither shall the same or any part thereof be subject or liable to his power, control, debts, or incumbrances, nor to any mortgage, sale, assignment, or other incumbrances thereof, of or by my said wife signed. I direct and declare the receipt and receipts of my said wife, signed with her own hand, in the event of, and after such her second marriage and notwithstanding any coverture, shall at all times be good and sufficient discharge for such rents and profits, interest and dividends, and annual produce and income, as in and by such receipt and receipts shall be acknowledged and expressed to be received ; and from and after the decease of my said wife, then as to all my said devised and bequeathed freehold and residuary, real and personal estate as aforesaid, with their

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respective appurtenances, and of which my said wife is to have the clear yearly income for her life (subject as aforesaid), upon trust for, and I do give, devise, and bequeath the same and every part thereof, and all my estate, term, and interest therein, with their appurtenances, unto and to the use of my said only son, the said *William S. Poyner*, his heirs, executors, administrators, and assigns, for his and their absolute use and benefit for ever. And I direct that the same may be conveyed, assigned, and paid to him and them accordingly. And I do hereby nominate, constitute, and appoint my said wife, so long as she remains and continues my widow and unmarried, but not longer, and my said son *William S. Poyner*, executrix and executor of this my will.

The testator died in April 1843. The widow and the son both proved the will. Part of the residuary estate of which the testator died possessed was leasehold; at the time of his death the greater part of this was in a bad state of repair; and it appeared by the Master's report, that at that period it would have cost 900*l.* to put the leasehold premises in repair. Four years after the testator's death, the landlord required the premises to be put in a state of repair, and the widow and the son caused repairs to be executed, and the expense was paid by the widow by instalments, she receiving the income of the testator's estate, and thereout paying these instalments, the debts, funeral and testamentary expenses, and the annuity to the son.

The son died in June 1848, leaving the Plaintiff his widow, to whom he devised and bequeathed his real and personal estate, appointing her his executrix, and she afterwards, in August, 1849, married the Defendant *Charles Harris*.

The cause came on now on further directions, and two questions were made: 1st, Whether the leaseholds ought to be converted; 2ndly, Whether the expense of the repairs was to be borne by the widow, or whether it was to be borne by the residuary personal estate of the testator.

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Mr. Baily and Mr. Rawlinson, for the Plaintiff.

On the 1st point, The widow of the testator does not take the leaseholds in specie, but subject to the usual rule of conversion; that is clearly the general rule, and there is nothing in the will to vary it. The testator does not specifically refer to his leaseholds; he only specifically mentions his real estate, stock, and mortgages; it is not necessary there should be an actual direction to convert.

2ndly, On the question of the repairs, assuming that the tenant for life is entitled to enjoy the leaseholds in specie, the Defendant, to maintain her contention, must say that a tenant for life has a right to call on the remainderman to put leasehold premises in repair. There is no authority for that. *Hickling v. Bowyer* (a) decides the contrary; that a person taking a specific gift of leaseholds must repair. [They cited also *Tracey v. Tracey* (b) and *Marsh v. Wells* (c).] It may be admitted that, as between the estate and the covenantee, the executor would be liable to pay out of the general estate, the repairs which ought to have been made by the testator; but that does not show that, as between tenant for life and remainderman, the remainderman is to pay.

(a) 16 Jur. 137.

(b) 2 Br. 128.

(c) 2 Sim. & Stu. 87.

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Mr. *Walford*, for *C. Harris*, the husband of the Plaintiff, argued in the same interest.

Mr. *Bacon* and Mr. *Baggalley*, for the widow, the Defendant, cited, on the question of conversion, *Blunt v. Hopkins* (a), *Pickering v. Pickering* (b).

Mr. *Baily*, in reply.

The VICE-CHANCELLOR :

The first question is, whether, according to the terms of the bequest of this residuary property, that portion of it which consists of leasehold estates ought, as between the tenant for life and the reversioner, to be converted and invested in investments of a permanent character. [His Honor stated the portion of the will set out in pp. 175 and 176, and proceeded:]—So far it is a devise and bequest of all the testator's real estate and all his residuary personal estate, to the wife and son, upon certain trusts. It specifies a particular freehold estate, and it specifies stock in the public funds, mortgages, and securities for money, but does not specify any other portion of the real estate. It does not specify leaseholds; but it is a bequest to the trustees of this property, and all the testator's estate, term, and interest therein; and it is bequeathed to the two trustees, according to the respective natures, tenures, and qualities thereof. Then the question is, What are the trusts declared, and of what property! The trusts are in these terms:—"Upon trust during the natural life of my said wife, and her remaining my widow, to pay to or permit and suffer her to receive and take the net or clear rents, issues, and profits, interest, dividends, and annual proceeds and income of

(a) 7 Sim. 43. (b) 2 Beav. 31; and 4 Myl. & Cr. 289.

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all my said devised freehold and residuary personal estate as aforesaid." Although this is not conclusive, up to this point, instead of any indication of an intention that the property should be converted, it appears to me that the testator meant that the wife was to have the income of that identical real and personal estate, which he had thus devised and bequeathed. Of course, it is "paying all outgoing and expenses, and the aforesaid income or yearly sum of 100*l.* to the son by equal quarterly payments as aforesaid." This is for the wife's absolute use. Now, though there is mention of rents there, I agree with the argument that the word rents may apply to the real estate; it is not necessary to refer that to the rents of the leasehold estate; still, although up to this point I do not think that what has been said by the testator is quite conclusive upon the point, I think the indication is in favour of an intention not to convert, rather than of an intention to convert. Then the will goes on thus: "And in case my said wife shall, after my decease, marry again, then upon trust during the remainder of her natural life, to receive and pay the said net or clear rents and profits, interest, dividends, and annual proceeds and income of all my said devised freehold and residuary real and personal estate as aforesaid, after paying all outgoing and expenses, and the aforesaid annuity or yearly sum of 100*l.* to my said son as aforesaid, into the proper hands of my said wife, for her separate use;" and the usual direction that the receipt of the wife should be a good discharge during coverture. That is in fact merely continuing to the wife, in case she marries again, the same life interest, but for her separate use, to protect her against the control of any husband she might marry; and then comes this limitation: "And from and after the decease of my said wife, then, as to all my said devised and bequeathed freehold and resi-

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duary real and personal estate as aforesaid, with their respective appurtenances, and of which my said wife is to have the clear yearly income for her life, subject as aforesaid, I do give, devise, and bequeath the same and every part thereof." Now observe the following words: "and all my estate, term, and interest therein, with the appurtenances, unto and to the use of my said only son, the said *William Stapleton Poyner*, his heirs, executors, administrators, and assigns, for his and their own absolute use and benefit for ever; and I direct that the same may be conveyed, assigned, and paid to him and them accordingly." And then he nominates his wife, during her widowhood, and the son, to be the executrix and executor. Now it appears to me clear, that what the testator considered he was giving to his son upon the wife's death, was the identical property which he had before bequeathed to the trustees upon the trusts; and he repeats the expression, "all my estate, term, and interest therein." Whatever, then, was the testator's estate, term, or interest in any portion of the property which he was devising to the trustees, that same estate, term, or interest he meant the remainderman to take, and that same estate, term, or interest was that of which the income was to be enjoyed by the widow for her life. It appears to me then clear, that the testator meant no conversion of the property; he meant the property, for such estate, term, or interest as he had in it when he should die, to be enjoyed in specie, first by his wife, and then enjoyed in specie by the son after her death. It is true that what the son would enjoy would be less in value than it would be at the time of the testator's death, because a part of that would be wearing out; but still, what he appears to me to have meant, judging from the terms he has used, was, that the property was to continue in specie until after the death of the wife, in

order that in specie it might go to the son. I am of opinion, therefore, that there was no intention to convert the property ; on the contrary, that there was an intention that the property should be enjoyed in specie.

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Now it has been justly observed, that the direction that the property should be enjoyed in specie does not necessarily make any particular portion of the property a specific legacy, in the ordinary sense of a specific legacy ; it is still part of the residue ; it is a residuary gift, with a direction that the residue shall not be converted. That is the effect of it.

Next, how does this affect the other question ? which is this : The testator, at the time when he died, having been in the possession, or the holder of this leasehold property, had, in violation of the covenants in the leases under which he held, suffered the property to fall into dilapidation ; and it appears by the Master's report, that the amount of the dilapidation which had occurred at the time when the testator died was 900*l*. He had violated his covenants ; and I must assume that the testator would have been liable to the landlord in an action for damages for breach of covenant. Shortly after the testator's death, the landlord seems to have made application to the widow, and to have given formal notices to her, and to have called upon the parties to make good the dilapidations ; upon which the widow and the son together took measures, the effect of which is that the widow, as I understand, paid the amount of the dilapidations, not all in one sum, but paid them by degrees, so as to satisfy the landlord's demand. Then comes the question, Is the widow to bear that expense out of her own pocket, or is it to be borne by the testator's residuary estate ? Now the cases which have been cited, I

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confess do not appear to me to govern the present case. Whether in the case of a dry specific legacy of a separate leasehold, where the testator was liable for dilapidations at the time of his death,—whether as between that specific legatee, and the person entitled to the general residue of the personal estate, the specific legatee should discharge that amount of dilapidation out of the general estate, or not,—the principle of such a case does not appear to me to govern the present case at all. In the case before Lord *Turo*, *Hickling v. Bowyer*, his Lordship decided against the specific legatee, principally upon the terms used in the will, though he certainly goes on to say that, irrespective of those terms, and upon general principle, he should still have decided the same way; and I must assume that to be right. But, assuming it to be right (although I confess, if it had been *res integra*, I should have questioned it very much,—not upon the terms of the will in that case, but upon the general principle), that was a question as between the specific legatee of a separate leasehold, and the residuary legatee of general personal estate. Here it is a question as between the tenant for life and the remainderman or the reversioner, of an aggregate mass of property, all constituting the residuary real and personal estate, of which the leaseholds in question form only a component part.

[Mr. *Baily*.—The leaseholds constitute the whole of the residue.]

The *Vice-Chancellor*.—That may be; it may turn out that they do so; except that I see the testator mentions his stock in the public funds, and his mortgages and securities which he might have; he left none, but he meant to leave some, and thought he should leave some. But, however that may be, it appears to me,

that without at all pretending to infringe upon the authority of the case before Lord *Truro*, whose authority, of course, I am bound to submit to, this is a case so entirely different, that very different principles are applicable to it. And it appears to me, that in this case, where there is a tenant for life and remainderman or reversioner, under the same will, of a large mass of property, consisting partly of this leasehold property, and that all this was subject, at the time when the testator died, to the payment of 900*l.* to the landlord, to make good the dilapidations incurred up to that time, that upon every general principle, the tenant for life ought not to bear that charge. In fact, if the landlord had thought fit he might have taken away the benefit of this leasehold property from both parties, by insisting upon entering for breach of the condition. But to prevent that, as well as to prevent an action for damages, the parties very wisely,—the tenant for life and the remainderman, being also the executor and executrix,—arranged that the payment should be made. That payment was made, and the result or effect of that payment being made, was that the property is preserved for the benefit of those who are interested in the residue; that is, preserved for the benefit of the tenant for life and the remainderman. It appears to me, that if there had been a fund of money or of stock, or any general fund, part of the residue, that ought to be applied in payment of this 900*l.* But whatever the residue be,—whether it be in one shape or another, whether it be large or small,—it appears to me, to the extent of the residue, it ought to go in discharge of this 900*l.*

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1852 :
10th and 11th
February,
and 1st March.

Issue.
Statutes.
Construction.
Lands Clauses
Consolidation
Act.

Principles on
which a court
of equity pro-
ceeds in direct-
ing and acting
upon the result
of an issue to a
court of law.

When the
verdict is such
as not to decide
the question in-
volved in the
issue, this Court
will not go
into the evidence
to decide upon
it itself, the ob-
ject of an issue
not being
merely to elicit
evidence, but to
obtain the assist-
ance of the opi-
nion of a jury,
under the direc-
tion of a judge.

The 79th sec-
tion of the

Lands Clauses Consolidation Act applies only to the jurisdiction of equity in ordering money to be paid out, and not to that of a court of law in determining the rights of parties in an issue.

EX PARTE THE FREEMEN AND STALLINGERS OF SUNDERLAND.

EX PARTE THE BISHOP OF DURHAM.

MR. BETHELL, Mr. *Wilcock*, Mr. *Hugh Hill*, and Mr. *C. Hall* were for the Freemen and Stallingers; and

Mr. *Stuart*, Mr. *Faber*, Mr. *Atherton*, and Mr. *Manisty*, for the Bishop.

The case was argued on the 10th and 11th February. On the 1st of March, the Vice-Chancellor delivered the following written judgment.*

THE VICE-CHANCELLOR:

These two petitions call upon the Court to determine who is entitled to the sum of 3410*l.*, which was paid in by the *York, Newcastle, and Berwick* Railway Company, as the purchase-money for about six acres of land, part of *Sunderland Town Moor*, lying in the parish of *Sunderland*, which six acres were taken by the railway company under the powers of its Act. This must, of course, depend upon the question, who was the rightful owner of the six acres of land at the time when the land was taken by the railway company.

* The Reporter was not present during the arguments; the facts, however, and the material arguments, are noticed in the judgment.

The claimants are the Bishop of *Durham* and the Corporation of the Freemen and Stallingers of *Sunderland*. There is no third claimant, nor any apparent possibility of a third claimant; and therefore, to one or other, or to both of the two claimants, the sum in question must ultimately be awarded.

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Both the claimants having, in the early part of last year, petitioned the Court, it seems to have been felt by the counsel on both sides, that the question as to the ownership of the six acres of land in question, was proper to be tried by an issue, to be directed to a court of law; and accordingly, without arguing the merits of the question before this Court, and adducing evidence in support of the respective claims, an issue was arranged by the parties or their counsel, and an order was made by Lord *Cranworth*, dated the 28th March, 1851, in these terms:—"The freemen and stallingers were to affirm, and the Bishop to deny, that the six acres or thereabouts, part of the tract of land called *Sunderland Town Moor*, taken by the railway company for the purposes of their undertaking, were, and that every part thereof was, on the 1st February, 1849, the soil and freehold of the said freemen and stallingers, and that the same were not, nor was any part thereof, on the day and year last aforesaid, the soil and freehold of the said Lord Bishop of *Durham*; and the freemen and stallingers affirm that some part, and the lord bishop denied that any part, of the premises were on the said day the soil and freehold of the freemen and stallingers; the Court being desirous to ascertain by the verdict of the jury, whether or not the whole of the hereditaments or any part was or were, on the said 1st day of February, 1849, the soil and freehold of the freemen and stallingers." By this form of issue, the corporation was made the Plaintiff-at-law.

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Ex parte
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The issue was accordingly tried at *Durham* on the 31st July, 1851, before Mr. *J. Vaughan Williams* and a special jury.

The case set up by the corporation was, that the freemen and stallingers were a corporation by prescription, and that as a corporation they had been, from before the time of legal memory, owners of the soil and freehold of the whole of the tract of land called the *Sunderland Town Moor*, including the six acres in question.

The case set up by the Bishop of *Durham* was, that he, in right of his see of *Durham*, was the lord of the manor of *Houghton-le-Spring*; that the tract of land called *Sunderland Town Moor* (including the six acres in question) was part of the waste of that manor; and that therefore the soil and freehold of the manor were vested in him as lord of the manor; and at the same time he admitted that the corporation was entitled to the herbage or vesture or pasturage of the moor, though not to the soil and freehold.

Much evidence (chiefly documentary) was adduced on both sides in support of the respective claims.

The learned Judge, in summing up the case to the jury, went with the utmost care and pains through all the details of the evidence, pointing out to them minutely and clearly, and I need hardly say most impartially, all the points for their consideration on each portion of the evidence; and having done that, he concluded his summing up thus:—"Now, gentlemen, this is the evidence on the one side and the other. You will have to judge for yourselves. The question is, is the evidence

adduced on behalf of the Bishop of a nature so powerful, that, notwithstanding the long series of acts of ownership, so unequivocal, so public, and so notorious, on the part of the Plaintiffs, you think the title is in the bishop, and that those acts, notwithstanding their publicity and notoriety, were merely the acts of usurpers,—if you think so you must find for the Defendant; if you think not, then you must find for the Plaintiffs. If your minds are equally balanced, and you cannot make them up, inasmuch as the burden of proof is on the Plaintiffs, you must find for the Defendant.”

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The jury found a verdict for the Defendant, but they delivered their verdict in these terms:—“ We find for the Defendant in accordance with his Lordship’s direction, neither party having made out their title to our satisfaction.”

Each of the contending parties has now presented a further petition, insisting that the effect of the trial has been to establish the right of the Petitioner.

It is contended, on the part of the corporation of freemen and stallingers, 1st, That the mere fact of the verdict being in favour of the Bishop is immaterial, and that an examination of the evidence at the trial will lead this Court to the conclusion that the right to the soil and freehold of the land in question, and not merely to the herbage or pasturage, was and is vested in the corporation; and that therefore the Court should disregard the verdict, and award the 3410*l.* to the corporation; 2ndly, That the evidence at the trial, if it did not conclusively prove the right of the corporation to the soil and freehold of the land, at least proved that the corporation was in possession; and that, under the 79th section of the

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**FREEMEN AND
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 LAND.**

Lands Clauses Consolidation Act, the corporation is to be deemed to have been lawfully entitled to the land, the Bishop having failed to establish a better title; and 3rdly, That if the Court should not accede to either of those views, there ought to be a new trial of the issue, on the grounds of misdirection of the learned Judge, and of the verdict being against the evidence. On the other hand, it is insisted for the Bishop of *Durham*, that he has the verdict in his favour; that the verdict is justified by the evidence; that the acts of ownership, which were proved at the trial to have been done by the corporation, had reference to their possession, not to the soil and freehold, but only of the herbage and right of pasture, to which their title is admitted; or, at all events, were acts of usurpation, and that the evidence proved the Bishop's own possession of the soil and freehold.

Upon one point in these several arguments, I entertain no doubt. I am clearly of opinion that I cannot regard this verdict, though in form a verdict for the Bishop, as expressing the opinion of the jury that the right is vested in his lordship. The jury, in delivering their verdict, declare that neither party had made out his title to their satisfaction, and that they find for the Defendant in accordance with the learned Judge's direction, which was, that if, upon considering the evidence, their minds were equally balanced, and they could not make them up, they should find for the Defendant. In fact, they would equally have found for the freemen and stallingers, if they had happened to be the Defendants.

Inasmuch, then, as the verdict leaves the question entirely undecided, can the Court enter into an examination of the evidence laid before the jury, and itself de-

cide the case at once in favour of either of the parties upon its own view of the effect of that evidence! In my opinion it cannot. This Court uses the machinery of an issue for the purpose of ascertaining the opinion which a jury, under the direction of one of the Judges, may form with respect to the question sent for trial, and not as a mere instrument to elicit evidence upon which this Court is to pronounce its own decision on the question. This Court will, indeed, upon an application for a new trial, look into the evidence for the purpose of examining whether there has been any such miscarriage at the trial as to justify it in refusing to be bound by the verdict, and in granting a new trial, but not for the purpose of pronouncing its own decision on the case irrespective of the verdict.

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On a similar ground I consider that I cannot go into the evidence before the jury, in order to try whether it is proved by that evidence that the corporation of the freemen and stallingers were in possession of the land at the time when it was taken by the railway company. And there is this additional reason why I ought not to go into the evidence for that purpose, viz., that no issue was directed to try the question who was in possession.

It therefore remains with me to consider whether there ought to be a new trial. It is contended, on the part of the freemen and stallingers, that there ought to be a new trial, on the ground of misdirection in the learned Judge, and it is insisted that he misdirected the jury in the following particulars:—1st, In stating to them, that if they should be satisfied that the Bishop was at any time since the disabling statute of Elizabeth the

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owner of the soil, he still continued to be so, omitting all reference to the Statute of Limitations ; and 2ndly, That he did not tell the jury that by the 79th section of the Lands Clauses Consolidation Act, the freemen and stallingers being in possession as owners, ought to be deemed the owners, unless they were satisfied that the Bishop had made out his title. With respect to the first point there is no doubt that, under the 29th section of the Statute of Limitations (3 & 4 Will. IV. c. 27), if the Bishops of *Durham* had once been in possession of the land, and had been dispossessed, and since the time of such dispossession, a period of not less than sixty years had elapsed, comprising two incumbencies of the bishopric, and six years of a third incumbency, the right of the Bishop would be extinguished. But it is equally clear, that if the counsel for the freemen and stallingers at the trial meant to rely on that statute as the foundation of their title, the onus lay upon them to show that the period of time during which the Bishops of *Durham* were alleged to have been out of possession, not only amounted to sixty years, but also comprised two incumbencies, and six years of a third incumbency. But so far from the counsel for the corporation having attempted to show this, their leading counsel, in his reply, declared very explicitly that he did not mean to set up a title founded on a possession during the period mentioned in the 29th section of the Statute of Limitations, but that he relied upon possession as the strongest possible evidence of title ; and he referred to the Statute of Limitations only as evincing the feeling of the Legislature on that point. It does not appear to me, therefore, that there was any misdirection of the Judge in this respect. Nor do I think there was any misdirection in omitting all reference to the 79th section of the Lands Clauses Consoli-

dation Act ; for that section appears to me to have been intended only as a direction *to this Court* how it should act in any case in which, upon an application for the money paid in or deposited by the railway company, it should be unable to arrive at a satisfactory conclusion as to what party was lawfully entitled to the land ; and I think that, upon an issue directed by this Court, for the purpose of enabling it, if possible, to arrive at a satisfactory conclusion on that point, it would have been a miscarriage to have directed the jury to have any regard to that section of the Act. Indeed, the counsel for the corporation, at the trial, seem to have been of that opinion, for they did not make the least attempt to draw the attention of the Judge or jury to the section of the Act in question. I am of opinion, then, that there was no misdirection in the learned Judge's summing up to the jury, and I cannot say that the verdict was against evidence, for I must consider that in effect there was no verdict at all deciding the question of right in favour of either party.

But though I cannot concur in the reasons upon which it is contended that there ought to be a new trial, of the issue, yet I am satisfied that I have no alternative but to send the case again to a court of law on this simple ground, that the trial which has been had, has not been attended with any such result as this Court can act upon. I do not, however, think that I ought simply to send the same issue to be tried again. The course which appears to me to be the best calculated to produce such a result as would enable this Court to dispose of the money is this : to direct two issues, the one to try the right, and the other to try the fact of possession. In the first issue I shall make the Bishop of *Durham* the

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Plaintiff; that is, he shall affirm, and the corporation shall deny, that the land in question was, on the 1st February, 1849, the soil and freehold of the Bishop of *Durham*. And in the second issue I shall make the corporation of the freemen and stallingers the Plaintiffs; that is, the corporation shall affirm, and the Bishop shall deny, that on the 1st February, 1849, the corporation was in possession of the soil and freehold of the land, as being the owners thereof, or in receipt of the rents of such soil and freehold, as being entitled thereto.

WALDRON v. SLOPER.

THIS was a claim to have the sum of 766*l.* 2*s.* 5*d.*, formerly in the hands of the trustees of a certain deed, dated the 25th of June, 1842, and afterwards paid into Court, paid to the Plaintiff, as prior equitable mortgage of one *Matthews*.

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1st June.
Equitable Mortgage.
Priorities between Mortgages.
Laches.
Bankrupt.
Order and Disposition.

In May, 1833, *Sloper* mortgaged certain real estate, by a deed of that date, to *Sievwright*, to secure 2500*l.*,

Sloper, in 1833, mortgaged certain real estate to *Sievwright*, with a power of sale, under which the property was sold in 1842 to a purchaser who transferred his contract to *Sievwright*. There was a balance after paying off *Sievwright*, and there being accounts between *Sloper* and *Matthews*, this balance was placed, under a deed of 25th June, 1842, in the hands of trustees to be dealt with by arbitration between *Sloper* and *Matthews*.

In 1834, *Sloper* had made an equitable mortgage of the property to *Matthews*.

In January 1840, *Matthews* deposited these deeds with *Waldron*, the Plaintiff, by way of equitable mortgage.

In April 1842, *Matthews* applied to the Plaintiff for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the Plaintiff never applied to have the deeds back for more than four years. In May 1843, *Matthews* deposited the deeds, by way of mortgage, with *Pinckney*, who now held them.

In 1846, *Matthews* became bankrupt. *Waldron* filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him.

Held that, as between *Waldron*, the Plaintiff, and *Pinckney*, the Plaintiff had, by his laches, enabled *Matthews* to commit a fraud, and had no equity against the Defendant, *Pinckney*.

The Court also expressed an opinion that the real estate, being converted into personalty before the bankruptcy, the right of *Matthews* was merely a right to receive a certain sum of money, and that no notice having been given by the Plaintiff or the holder of the deeds to the trustees, the right to receive the money remained in the order and disposition of *Matthews*, and passed to his assignees. This point did not, however, arise for express decision.

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and, by a subsequent deed of 1834, a further sum of 1200*l.* was secured. The mortgage deed contained a power of sale, under which the mortgaged property was sold by auction on the 7th of June, 1842, to one *Peto*. By the deed of the 25th of June, 1842, reciting the deeds of 1833 and 1834, and that *Peto* had agreed to transfer his contract for the purchase to *Sievwright*, and *Sievwright* had agreed to adopt it, the property was conveyed to *Sievwright* for 3500*l.*; and there being on this a balance of 766*l.* 2*s.* 5*d.*, after settling the mortgage account between *Sloper* and *Sievwright*, that sum was placed in the hands of Messrs. *Maynard* and *Bishop*, parties to the deed, in trust for *Sloper* and *Matthews*, between whom there was then an account, to be dealt with according to the determination of an arbitrator, to whom they had agreed to refer their differences. In August, 1834, *Sloper* by deed mortgaged the equity of redemption to *Matthews* to secure 100*l.* In January, 1840, *Matthews* deposited his mortgage deed with the Plaintiff *Waldron*, by way of equitable mortgage, and signed a memorandum, by which he bound himself to execute a complete mortgage. In April, 1842, *Matthews* wrote to the Plaintiff, telling him the mortgaged property was sold, and asking him to lend him the deed held by the Plaintiff, to enable him, *Matthews*, to produce it, as it would be requisite for completing the purchase, and he promised to return it forthwith. He did not return it, nor was he called upon to do so by the Plaintiff; and in May, 1843, *Matthews*, being indebted to *Pinckney*, deposited with him this deed. In 1846, *Matthews* became bankrupt, and in the mean time, as stated, viz. in June, 1842, the mortgaged property was sold, and the balance to which *Matthews* had a claim was paid into the hands of trustees, and afterwards paid into Court.

In this state of things, *Waldron* filed his claim against *Sloper* the original mortgagor, *Pinckney* the mortgagee by deposit of the 15th of May, 1843, the assignees in bankruptcy of *Matthews*, and *Maynard* and *Bishop* the trustees of the deed of the 25th January, 1842, to have the balance of 766*l.* 2*s.* 5*d.* in Court paid to him as first incumbrancer. *Pinckney* resisted the claim on the ground, among others, that a fraud had been committed on him, which postponed the Plaintiff to him. The assignees of *Matthews* resisted the claim, on the ground that the property had been converted into personalty long before the bankruptcy; that the rule of order and disposition applied, and that the money belonged to the assignees of *Matthews*.

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Mr. *Rogers*, for the Plaintiff.

The Plaintiff was clearly the first equitable incumbrancer; his mortgagor borrowed the deed from him for an apparently reasonable purpose, and there was nothing to put the Plaintiff upon suspecting fraud. That *Matthews* had committed a fraud upon *Pinckney* could not postpone the Plaintiff, who was no party to it. Besides, the deposit of the deed, which is a chattel real, vested the legal title to the deed in *Waldron*, and that could not be taken from him by a subsequent deposit by *Matthews*, of the deed which was no longer his: *Wiltshire v. Rabbits* (a). As to the property being in the order and disposition of the bankrupt, that doctrine does not apply: *Ex parte Mackay* (b), *Jones v. Gibbons* (c). To constitute order and disposition it must be with the knowledge and consent of the party to be deprived of his claim: *Ex parte Bell* (d). Here there

(a) 14 Sim. 76.

(b) 1 Mon., Dea. & De G. 550.

(c) 9 Ves. 407.

(d) 1 De G. Cases in Bankruptcy, 577.

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was no consent; for the deed being lent for a particular purpose, and dealt with for another, that was a fraud, and such a parting with the property did not amount to consent within the authorities.

Mr. James T. Wood, for Maynard and Bishop, the trustees of the 766l. 2s. 5d.

Mr. Stuart and Mr. Shapter, for Pinckney.

The deposit by *Matthews* of the deed with *Pinckney & Co.*, to secure their debt, makes *Pinckney* an equitable mortgagee without notice; the Plaintiff, by giving possession of the deed to *Matthews*, in the way he did, enabled him to commit a fraud, and he thereby lost his priority, even if the mortgaged property were real estate: *Bowen v. Evans (a)*, *Head v. Egerton (b)*, *Kennedy v. Green (c)*. But the mortgaged property was personal estate at the time *Pinckney* took a deposit of the deeds. The estate mortgaged to *Sievwright* was converted into money by the sale, and therefore it was no longer a question of equitable mortgage, and priority of deposit had no application as affecting priority of estate. That *Waldron* had notice of the conversion is plain; the application to him for a loan of the deed told him that the estate was sold. The sale was in January, 1842, the deposit with *Pinckney* in April, so that at that time the Plaintiff's security was merely a personal chose in action.

There was great delay on the part of the Plaintiff in making any attempt to get the deed back, and that delay will render him liable to be postponed: *Peter v.*

(a) 1 Jones & Lat. 178. (b) 3 P. Wms. 280.
 (c) 3 Myl. & K. 699.

Russel (a), Evans v. Bicknell (b), Worthington v. Morgan (c), Whitbread v. Jordan (d), Swayne v. Swayne (e).

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Mr. Giffard, for the assignees of *Matthews*.

At the date of the bankruptcy the deed of mortgage to *Matthews* was of no value; the subject-matter of it had ceased to be realty: the money was in the hands of trustees for the Plaintiff, and was therefore in his order and disposition, and passed to his assignees. *Ex parte Mackay*, and the like, are cases where, at the date of the bankruptcy, the property was real estate. The claim of the Plaintiff cannot therefore be sustained.

The VICE-CHANCELLOR:

In this case a fraud has, undoubtedly, been committed by *Matthews* against two persons, and one of them must suffer; the first question is between the Plaintiff and *Pinckney*; the second is between the Plaintiff and the assignees of *Matthews*. Each of these questions arises on this claim, and must be considered. The material circumstances are these:—*Sloper*, being the owner of certain real estate, mortgaged it to *Sievwright* with a power of sale which he might exercise without the consent of the mortgagor, or of any body claiming under him. Afterwards he mortgaged it to *Matthews*, by the deed of August, 1834, by which he mortgaged the equity of redemption to *Matthews* in fee for 100*l.*; the rights acquired by *Matthews*, by virtue of that deed, were not to any legal estate; he became mortgagee of an equity of redemption after a prior mortgage, subject to the rights of a prior mortgagee, who had a power by exercising his

- (a) 2 Vern. 726.
(b) 6 Ves. 174.
(c) 16 Sim. 547.

- (d) 1 You. & Co. 303.
(e) 11 Beav. 463.

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power of sale to convert at any time the right of *Matthews* into a mere right to receive money; *Matthews* having that right, in January, 1840, deposited his deed with the Plaintiff *Waldron*, and signed a memorandum accompanying the deposit, by which he bound himself to make a complete mortgage. The position of the Plaintiff was then this. He might call on *Matthews* to make an actual conveyance, and then stand in the same position as *Matthews*, but until there was an actual conveyance, his right was to say that whatever was forthcoming to *Matthews* as the fruit of his mortgage, the Plaintiff had a right to that, to the extent of what should be remaining due to him. So matters continued until the 1st of April, 1842, and then the Plaintiff received a letter from *Matthews*, saying the mortgaged property was sold; he does not in that letter say that it was sold by the first mortgagee, but that might be inferred, for nobody else it appears could sell. However, he says that the property was sold, and he asks the Plaintiff to lend him the deed deposited with him, in order that he, *Matthews*, might produce it as being requisite in completing the sale. Now this might be either a fraud at the time, or he may have originally borrowed the deed with a good intention, and afterwards detained it with a bad one. I confess I do not see why it was necessary for completing the purchase, that the deed should be produced. It is not, however, very material whether *Matthews* had an honest purpose or not in borrowing the deed. In fact, he did borrow it, promising to return it when he returned from *London*; the Plaintiff lent it, and it appears to me that if the Plaintiff had got back the deed on the return of *Matthews*, even though he might in the mean time have made an improper use of it, nobody could have acquired thereby any interest as against the Plaintiff. But

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having been told by the letter of April, 1842, that the estate was sold, he took no steps to inquire about the sale; all he did was from time to time to ask for the deed; it is not said in his affidavit when and how often, or at what periods, he did so. However, he allowed the deed to remain in the possession of *Matthews*, or of any other person to whom he might have pledged it, from April, 1842, to December, 1846, when the fiat against *Matthews* issued. It appears that the estate was sold in January, 1842; it was purchased by *Peto*. Now it is very probable that *Peto* was but the nominee of *Sievwright*. Whether that is so or not, the sale was, or must at any rate in this suit, be taken to be valid, and it was carried into effect, and a conveyance made to *Sievwright*; and after paying off his mortgage, a sum of 766*l.* 2*s.* 5*d.* of the purchase-money remained, and if there had been no mortgage to *Matthews* this would have been paid to *Sloper*; but *Sievwright* being aware of the second mortgage to *Matthews*, and that to the extent to which anything on that mortgage was due to *Matthews* it would be payable out of the surplus, and there being questions between *Sloper* and *Matthews* as to what was due to *Matthews*, it was agreed that it should be placed in the hands of trustees to abide the result of an arbitration as to how much was due to *Matthews*, and to what extent it was held on trust to pay *Matthews*. *Sievwright* was not, apparently, aware of the deposit to the Plaintiff, nor did he, it seems, know of the deposit to *Pinckney*. Now the Plaintiff having allowed *Matthews* to retain the deed which he had promised to return, for four years and a half, *Matthews* became bankrupt in 1846, and then it came out that one year after he had got the deed he had deposited it with *Pinckney* for securing an advance, and the Plaintiff now comes for the assistance of a Court of equity against

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Pinckney, he asks for payment of the money to him in preference to *Pickney*.

I will take this part of the case first. Now it is an elementary principle that a party coming into equity in such a case is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the Plaintiff's right, as to induce an innocent party to assume that he was dealing with his own. If, here, ordinary diligence had been used by the Plaintiff, if instead of resting satisfied with the excuses of *Matthews*, he had insisted on the deed being returned, not in one or two months, but even in nine or twelve months, even then in the events that have happened *Matthews* could not have committed the fraud. But *Matthews* having committed the fraud in May, 1843, in consequence of the neglect of the Plaintiff from then to December, 1846, *Pinckney* was induced to go on making advances to *Matthews* on the faith of his possession of the deed. If ever there was a case in which, as between two innocent parties, that one must suffer who has permitted the fraud to be committed, it is this case, and I am of opinion that the Plaintiff, who, by his great neglect put it in the power of *Matthews* to commit the fraud, has no right to come and ask equity to interfere.

Next, as to the question between the Plaintiff and the assignees of *Matthews*. At the time the Plaintiff received the memorandum accompanying the deposit by *Matthews*, the Plaintiff acquired an interest in real estate, not as owner, nor perhaps strictly as mortgagee, but a right of this sort, that whatever *Matthews* could work out by virtue of his estate, the Plaintiff should have a right to stand in his place. Now *Matthews's* interest was an in-

vered in real estate conversion as any time now money, and that conversion is what actually happened. For in June, 1842, the right of Matthews under his mortgage, became a mere right to recover money placed in the hands of trustees. At the time then of the bankruptcy, whether the right was in Matthews or in the Plaintiff, or in Pinckney, or in the assignees of Matthews, it was a right to receive a sum of money. The deed then had ceased to be of any value as a deed affecting real estate. It may be that, under certain circumstances, the person holding that deed might have had by reason of it a claim to be paid the surplus money. But as no notice was in fact given by the holder of the deed, or by the Plaintiff, either to the first mortgagee or to the trustees of the deed of the 25th June, 1842, the effect is that Matthews had a right to require payment to him, and that the rule as to order and disposition does apply. The possession of the deed gave, I think, no right to Pinckney, unless he had given notice of his claim, the prior right to receive the money being in the assignees. It is unnecessary, however, upon this record, to decide that point, and the order will be simply to dismiss the claim with costs, and the money must be paid back to the trustees.

1842
WALSHAM
v.
SLOAN.

1852:

2nd July.

Practice.Costs.*Husband and
Wife.**Wife's Equity
for a Settlement.*

As between the husband's creditors and the wife, in respect of the wife's equity for a settlement, the Court will, under circumstances, give the wife more than one-half; and where the wife had been, at the time of the marriage and long afterwards, in circumstances of comfort, and was reduced to distress by the husband's embarrassments, the Court gave the costs of the Petitioner and of the husband's assignees out of the fund, which was 681*l.*, 400*l.* to the wife, and the remainder to the Petitioner; the wife's costs out of her own fund.

THE 10 & 11 VICT. c. 96, and the Trusts of
WAITE'S WILL.

EX PARTE PUGH.

THIS was a petition by the surviving assignee of Mr. *Carttar*, (under a deed of assignment for the benefit of his creditors,) seeking that a sum of 681*l.* Reduced Bank Annuities, to which Mrs. *Carttar* was entitled under the will of Mr. *Waite*, and which had been transferred into Court under the Trustees' Relief Act, might be paid to Petitioner, subject to the costs and to Mrs. *Carttar*'s equity for a settlement.

Mr. *Carttar* had, after the assignment, become a bankrupt.

Mr. *Teed* and Mr. *Simpson*, for the petition, offered to settle half the fund on Mrs. *Carttar*. They cited *Napier v. Napier* (a), and *Vaughan v. Buck* (b).

Mr. *J. Hinde Palmer*, for the wife, cited *Re Cutler* (c), and *Scott v. Spashett* (d). As to the costs, they ought to be paid thus: the wife's out of her share; the other costs out of the remainder.

Mr. *Teed*, in reply, referred to *Carter v. Taggart* (e).—

(a) 1 Dru. & War. 407.

(d) 3 M'N. & Gor. 599.

(b) 1 Sim. (N. S.) 284.

(e) 5 De G. & Sm. 49.

(c) 14 Beav. 220.

The claims of the husband's creditors are as much the object of concern to this Court as those of the wife. As to the costs, if the wife had come for a settlement it must be at her own cost; there is no reason why it should be different because the application is made by the husband's creditors.

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Mr. Brett appeared for the assignees in bankruptcy of Mr. Carttar.

The VICE-CHANCELLOR :

If it is too much to say that it is a positive rule, certainly it is at least the practice to give half of the fund to the husband or his assignees. In *Napier v. Napier* the view taken by the Lord Chancellor was, that, in the absence of special cases, half the fund should go to the wife and children, and the other half to the husband; but that, if there were special circumstances, a larger share might be given to the wife.

Is there then here any circumstance sufficient to occasion a departure from the usual rule or practice? I think that here it is a circumstance to be looked at, that this lady being, at the time of her marriage, and for a long time afterwards, in a position of respectability, and indeed of affluence, is now reduced by her husband's embarrassments; that may properly be taken into consideration, and I think that the right course to be taken will be this, that the assignees and the Petitioner should have their costs paid out of the fund, and then I think it will not be going beyond the practice to settle 400*l.* of the stock, and to let the Petitioner have the remainder; that will be giving them much less than half, but I think the circumstances are sufficient to justify it. Mrs. Carttar's costs will of course be paid by herself. The order will

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Ex parte
PUGH.

be that 400*l.* of the fund in Court shall be carried to the separate account of the wife and children, and the settlement will be embodied in the order, which will direct the dividends to be paid to the wife during her life, after her death to such of her children as, being sons, shall attain twenty-one, or, being daughters, shall attain twenty-one or be married, with liberty to apply after the death of the wife ; the balance of the fund to be paid out to the Petitioner.

1852:
25th March
and 25th June.

Winding-up
*Acts.**Contributory.*
Official Ma-
nager.
Costs.

A. became a member of the provisional committee of a projected Company, which was never completed. He signed the agreement required by the Registration Act ; he applied for 100 shares, undertaking to accept them if allotted ; instead of 100 shares being allotted to him, he, in common with other committee-men, was requested to take up twenty-five ; he did not take them up. He was called upon then to pay two successive payments, making together 105*l.*, on which he was assured he should be protected from the claims of creditors ; he did, in consequence, pay 105*l.* Held, that *A.* was not a contributory.

IN THE MATTER OF THE WINDING-UP
ACTS, 1848 AND 1849, AND OF THE WOL-
VERHAMPTON, CHESTER, AND BIRKEN-
HEAD JUNCTION RAILWAY COMPANY.

EX PARTE ROBERTS.

THIS was a motion by the official manager to reverse the decision of the Master, excluding from the list of contributories the name of Mr. *Roberts*, and to have his name included.

The Company was one of the abortive railway companies attempted to be formed in 1845. Mr. *Roberts* was placed, at his own request, on the provisional committee

1852.

Ex parte
ROBERTS.

in 1845, and he signed a consent to be on the committee, and to take one or more shares in the company. He never attended any meeting of the committee, or took part in the management of the company. On the 28th of October he received the following letter from the secretary of the company:—"It having been determined that each member of the committee shall be entitled to receive any number of shares which he shall require, not exceeding 100, I have to request that you will do us the favour of filling up the annexed form, having regard to the above regulation, and transmitting it by post as addressed. Should the form not reach me within four days from the date, the allotment will be proceeded with as if you had declined taking any shares." On the 1st of November, 1845, Mr. *Roberts* signed the form, requesting the secretary to allot to him 100 shares, agreeing thereby to accept them, and to pay the deposits, and to execute the subscribers' agreement and parliamentary contract. On the 20th November, 1845, the following document was sent to Mr. *Roberts* by the secretary:—"Wolverhampton, Chester, and Birkenhead Junction Railway Company. Provisionally registered, pursuant to 7 & 8 Vict. c. 110. Capital 1,000,000*l.*, in 50,000 shares of 20*l.* each. Deposit, 2*l.* 2*s.* per share. Allotment 25 shares; deposit 52*l.* 10*s.* Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted you 25 shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of 52*l.* 10*s.*, must be paid to one of the under-mentioned bankers, who, upon receipt thereof, will sign the voucher at the foot of the letter. This letter, with the bankers' receipt, must be exchanged for scrip certificates, which will be granted upon your executing the subscribers' agreement and parliamentary contract, without which no person will be recognized as a sub-

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scriber, or be entitled to any interest in the undertaking." The rest of this document contained the names of the bankers and the form of receipt. This was accompanied by a letter stating that the acting committee *requested* each member of the provisional committee at once to take up the accompanying allotment of 25 shares, and that the remaining 75 shares allotted to the committee might be taken up at any time before the 12th January. In December, 1845, the members of the provisional committee were applied to, requiring them to pay 52*l.* 10*s.*, being the amount of deposit on 25 shares, by the 7th January, 1846. In February, a further requisition was made upon the members of the provisional committee to pay the further sum of 52*l.* 10*s.*, pursuant to a resolution of the provisional and acting committee of the 19th February, 1846, that such call should be made, and "that the parties so contributing should be protected from the claims of creditors." On the 26th February, *Roberts* paid the sum of 105*l.* to the bankers of the Company. *Roberts*, in his affidavit, swore that he did so in consequence of being threatened with legal proceedings; and on receiving a letter informing him that, on paying the 105*l.*, the committee would guarantee him from further calls in respect of his being a committee-man; and that he paid it to purchase freedom from anxiety and trouble. He afterwards, in August, 1846, under similar circumstances, made a further payment of 60*l.*, and he swore that neither of the payments were intended by him as a deposit or payment in respect of shares. The remaining material facts will be found in the judgment.

Mr. C. P. Cooper and Mr. Roxburgh, for the motion, referred to *Dale's case* (a). Mr. *Roberts* was one of the

forty persons, whose case was actually included in the judgment in that case. That case decided that *Dale*, and therefore also *Roberts*, was liable to a call to pay the debts of the company. He is therefore a contributory. He signed the registered consent to act, and to take one or more shares, and twenty-five shares were allotted to him. These two circumstances bring him within *Upfill's case* (a) and *Dale's case*. If he is, and we say he is, liable to a call, he must of necessity be a contributory; therefore, though *Dale's case* was a case of enforcing a call, it in effect decided that *Dale* was a contributory.

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Mr. Malins and Mr. Selwyn, for Roberts.

Roberts applied for 100 shares. His being a provisional committee-man did not alone make him a contributory, he must also have accepted allotted shares. The allotment was not made till the time had arrived at which there was no hope of the scheme being carried into effect: *Matthews' case* (b), *Carmichael's case* (c). *Roberts* signing an agreement as registered promoter to take one or more shares does not make him a contributory. As to the contract, he applied for 100 shares, and 25 shares only were allotted. There was no contract binding on him unless 100 shares had been allotted to him. At the meeting at which the resolution was passed, that each committee-man should pay in all 105*l.*, he was not present. Being called upon to pay, and threatened with legal proceedings, and not till then, for the sake of peace and to avoid litigation, he paid the 105*l.* *Besley's case* (d), *Carrick's case* (e). *Dale's case* was not a case of con-

(a) 2 H. Lords' Cases, 674. (d) 3 De G. & S. 224.

(b) 3 De G. & Sm. 234.

(e) 1 Sim. N. S. 505.

(c) 17 Sim. 163.

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tributory or not, but only on the propriety of a call, and the particular liability of *Dale* and those in the same interest was the only thing in question. There is no legal liability in Mr. *Roberts*, unless he is brought within *Upfill's case*. A committee-man is not as such liable: *Cottle's case (a)*. There must be an agreement to act as committee-man, and also acceptance of shares; either separately will not do. *Dale's case* does not apply, he was on the list of contributories. In that case the Master's report was not objected to, and the question whether the ingredients necessary to constitute a contributory existed, was not and could not be argued before the Lords Justices. In this case the letter of allotment was too late (*Carmichael's case* above cited). Four days was the time fixed by the committee, and three weeks was the time taken before they allotted the shares. They waited till the chance of proceeding with the scheme was at an end. *Roberts* did not waive this lapse of time. Besides, they proposed to allot 25 shares when he had asked for 100. This was a new contract which *Roberts* never accepted until threatened, and then for the sake of peace he paid the money required. He never did any other act of acceptance; he did not pay the 52*l.* 10*s.* as a call.

[The *Vice-Chancellor*.—The letter of the 20th November, 1845, states an actual *allotment*; in *Carmichael's case* was there any allotment?]

Selwyn.—But by the letter of the 20th November, which was too late, even if they had allotted 100 shares, they only offered him 25. Mr. *Roberts* never accepted this new proposal: *Carrick's case (b)*, *Conway's case (c)*.

(a) 2 M'N. & Gor. 185.

(b) 1 Sim. N. S. 505.

(c) 16 Jur. 120.

In that case the Court said, to bring the case within *Upfill's case*, I consider it incumbent on the official manager to show that the offer was made to the contributory, and was followed substantially by an allotment of shares.

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[The Vice-Chancellor.—Is not the meaning of *Upfill's case* that he was made liable on these grounds: that he was a provisional committee-man; that there was an allotment of shares; and that there was a subsequent acceptance of shares in the character of committee-man! Are not those *three* ingredients requisite?]

Selwyn.—*Upfill* was made liable on the ground of the letter in which he expressed himself thus:—"I accept the 100 shares allotted to me in the Direct *Birmingham, &c., S. Upfill* (a); *Manwaring's case* (b) was reversed by the Lords Justices (c).

Mr. Cooper, in reply.

The VICE-CHANCELLOR :

This is an appeal by the official manager from a decision of the Master, excluding the name of Mr. *Roberts* from the list of contributories; and it is contended, on the part of the official manager, that this case comes within the principle of *Upfill's case*, because it is said that as in that case, so here, there has been the union of these two circumstances: 1stly, That *Roberts* was one of the provisional committee-men. 2ndly, That he agreed to take shares.

25th June.

(a) See 2 H. L. Cas. 676. (b) 16 Jur. 263.
(c) 16 Jur. 392.

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That he was a member of the provisional committee is not disputed, and it is contended by the official manager that his agreement to take shares is established on three grounds: 1st. That he signed the memorandum required by the Joint-Stock Companies Act, by which he agreed to be a member of the committee, and to take one or more shares; 2ndly. That he actually applied for shares, and had a letter of allotment; and 3rdly. That he paid deposits or calls upon his shares. Mr. *Roberts* insists, on the contrary, that there was no final acceptance of shares by him, and that the payments made by him were only made for the purpose of getting rid of the legal liabilities which, according to what was then believed to be the law, attached to him. The question to be determined is, whether this case is within the principle of *Upfill's case*. Now, as I understand the principle of that case, it amounts to this, that although a person becoming a provisional committee-man, would not be liable merely as such to contribute to the expenses incurred in endeavouring to form a company; and although any individual agreeing to take shares, and even paying a deposit, is not liable as such, because the shares which he agreed to take are shares in the company when it shall be formed, which company never is formed, and never had existence, yet, if a provisional committee-man enters into an agreement that he will take a certain number of shares in the company, when it shall be formed, so that such agreement is final as between him and the provisional or managing committee, then he does, for some reason, become liable to contribute to the expenses of endeavouring to form the company, although it never is formed. But the principle of *Upfill's case* involves this, that, to constitute such a final agreement, there should be an actual allotment of shares, and some act of acceptance of the shares so allotted. And if in any case these

circumstances do not co-exist, it is not within *Upfill's case*.

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In dealing with cases of this kind, I will not do anything to extend the doctrine of *Upfill's case*; if a case falls strictly within it, I shall follow it; but if not, I will not in any degree extend the principle.

The facts of this case are as follows:—On the 10th October 1845, *Roberts* sent a letter to the solicitor of the provisional committee, requesting to have his name placed on the list of committee-men, and his name was so placed; but he did not attend any meetings. However, he was clearly, at the time of the transactions in question, one of the members of the provisional committee. On the same 10th October 1845, the body calling itself the acting committee passed a resolution to the effect that every provisional committee-man should be entitled to have 100 shares, but should be required to hold twenty-five shares, in order to be qualified to act as a provisional committee-man. Whether that resolution was communicated to *Roberts* does not appear. There is no evidence, except the letter of the 28th October, that the resolution was communicated to him; and it will be observed that the letter of the 28th October does not allude to the clause requiring each provisional committee-man to hold twenty-five shares. (The *Vice-Chancellor* read the letter set out in page 205, and continued):—Annexed to the letter was a form of application to be filled up by *Roberts*, and he did fill it up and send it to the solicitor of the committee. Now I will pause here to consider what was the effect of these two documents,—the letter from *Smith* the solicitor, and *Roberts'* answer. The letter of application, as filled up, was a letter requesting that “you will allot me 100

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shares," and that is followed by an agreement to accept them, and to pay the deposit. What would have been the effect if, in answer, a letter of allotment had been sent, it is not necessary for me to determine, because no answer was sent to *Roberts*. Nothing was done by way of communication to *Roberts* till the 20th November, when another letter was sent to him ; but in the mean time, viz. on the 17th November, another resolution was come to by the acting committee, to the effect that each provisional committee-man should be requested to take up and pay the deposit on twenty-five shares. Of course this resolution, except so far as it was communicated to *Roberts*, was not binding upon him. But what does this resolution show ? Not that the committee was going to allot shares to the provisional committee-men and to others, but that they were casting about for the means of raising money to enable them to pay their way ; and though they had not come actually to the determination of abandoning the concern, yet it is clear they were beginning to question in what way they could raise the money, and then they resolved that each provisional committee-man should be *requested* to take up and pay on twenty-five shares. At this time *Roberts* had applied for 100 shares. The committee do not adopt that application ; they do not say " we allot you the 100 shares, which you have applied for ;" they do not even say, " you having bound yourself to take 100 shares, we *allot* you twenty-five shares ;" but, " we *request* as a matter of favour, not of right, that each of the provisional committee-men will take up twenty-five shares : " and on the 19th November another resolution was come to, that a letter should be sent to each of the provisional committee-men, requesting him to take up twenty-five shares. On the 20th November, *Smith* addressed to *Roberts* the following letter, and to that letter was annexed a letter of allotment of twenty-

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five shares, in these terms :—(His Honor read the document referred to in p. 205.) And the form of receipt was added. Now consider the effect of this last communication. *Roberts* had been told that, as a provisional committee-man, he might have 100 shares; and he had accordingly applied for 100 shares. He did nothing further till he received this circular, informing him that the committee *requested* that he would take up twenty-five shares. Instead of taking up that amount of shares, he takes no notice of the communication; nothing whatever is done by him then; but this takes place. Notwithstanding the expectation previously held out, the committee appears to have come to the conclusion that the concern was not likely to succeed; and on the 1st December a resolution was come to by the acting committee, that no further expenses should be incurred, without the express direction of the committee; and another resolution was come to on the 26th December, that a letter should be sent to the members of the acting and of the provisional committee, requesting them to pay each the sum of 52*l.* 10*s.* There is nothing to show that any such letter was sent to *Roberts*, and I must assume that no such communication was made to him. On the 19th of February another resolution was passed, that a call should be made for an additional sum of 52*l.* 10*s.*; and that the parties so contributing should be protected from the claims of creditors. A copy of that was sent to *Roberts*; and that was the only communication made to him on the subject of the second call. Now that resolution does not allude to the sum required as a payment of a *deposit*, but simply calls for a sum of 52*l.* 10*s.*, making, with the former payment, a gross sum of 105*l.*, and on payment of it the parties were to be protected from the claims of creditors. Now these transactions amount to this: The scheme was abandoned; the committee of

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management are called upon to discharge liabilities, and they thought they had found a way to do so by calling on each member of the committee to contribute. They first fixed on a sum of 52*l.* 10*s.* Then by another resolution they add another 52*l.* 10*s.*, which they treat as a call; and *Roberts* is thus called upon to pay 105*l.*, and is told that in doing so he shall be protected against liabilities. On the 26th February, he does pay 105*l.* to the bankers. Can this payment be treated as a deposit on shares? If, indeed, he had paid in the first instance, while the scheme was being carried on, that possibly might have amounted to an acceptance of shares; but when, after the abandonment of the scheme, he is called upon to pay a gross sum, and is told that on payment of it he is to be protected, such a payment is not, I think, an acceptance of shares so as to bring the case within *Upfill's case*. I am of opinion on the whole that neither on the ground of allotment and acceptance of shares, nor on the ground of payment, can *Roberts* be treated as a contributory. The only remaining ground on which it is contended that he is liable is, that he signed the registration paper required by the Act of Parliament. But it has been decided in several cases that that does not amount to an acceptance of shares within the principle of *Upfill's case*. In *Carrick's case* the alleged contributory had covenanted to take one or more share or shares in the company. So in *Carmichael's case*, there was an agreement to accept such shares as might be allotted to him; and a formal covenant to be one of the provisional committee, and an agreement to take one or more shares, &c. In each of those cases there had been execution of the document required by the Registration Act; and that was not held to make the party a contributory. But if it had not been so decided in those cases, I should still have so decided it here;

otherwise I should be extending the doctrine of *Upfill's case*. I must decide, therefore, that the Master was right, and the appeal must be dismissed with costs.

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Some discussion took place as to whether the official manager should pay the costs personally, or out of the estate. The Court observed strongly on the duty of official managers not to present appeals, except in cases of material importance and substantial doubt, and pointed out that where appeals were recklessly presented by official managers, they would be made personally to pay the costs, if unsuccessful. In the particular case before it, the Court thought it was not improper for the official manager to appeal, and directed him to pay the costs of the Respondent out of the estate.

1852:
4th November.

*Practice.
Statutes.
Scientific
Assistance.*

The 42nd section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80) does not authorize the Court to delegate to the Master the power of calling in scientific aid. But where, before the Act, a complicated claim for a debt requiring such aid had been referred to the Master, and liberty had been given to the claimant to bring an action; as it appeared that such action, if brought, must go to arbitration, the Court ordered the matter to be disposed of in chambers, where the Judge would call in such scientific aid as he should think fit.

MILDMAY v. LORD METHUEN.

THIS was a petition in a suit for administering the estate of the late Lord *Methuen*, by one *Holland*, a builder, who was found by the separate Master's report, made in the cause, to have a *claim* for his bill for builder's work against the estate of the late Lord *Methuen*. The Plaintiff was the executor of Lord *Methuen*, and admitted a claim, but disputed the amount claimed, objecting to various items. The Master allowed 10,097*l.* 2*s.* 6½*d.*, the balance of an account of nearly 23,000*l.*, as a *claim*, but not as a *debt*. The Petitioner had obtained, in May 1852, an order on petition for liberty to bring an action, but no action had been brought; and this petition now came on to be heard, asking that the order of May 1852 might be discharged, and for a reference to the Master, to whom the cause was referred, to ascertain what was due to the Petitioner in respect of his claim. *And that he might be at liberty to obtain the assistance, in such manner as he might think proper, of such architect or other professional person as he might think fit and nominate for that purpose.*

The petition alleged that from the nature of the claim, being a builder's bill, many items of which were disputed, if an action was brought it would not be tried, but the matter would be sent to arbitration, which it alleged would be a very dilatory and expensive proceeding, &c. It alleged that at the time the first petition was presented there was no other course open to the

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Petitioner except an action, and it relied on the Masters Abolition Act, 15 & 16 Vict. c. 80, s. 42, as giving the Court now jurisdiction to do what was asked.

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Mr. Malins and Mr. Jessell, for the Petitioner.

The Petitioner had been advised by counsel at the common-law bar, that a reference to arbitration would be inevitable if an action were brought. They referred to the 15th & 16th Vict. c. 80, ss. 10, 39, and 42, the last of which is the one relied on in support of the prayer of the petition, and to ss. 61 & 62 of 15 & 16 Vict. c. 86. This is an account which can only be settled by an architect; the right to be determined is a legal right to a debt; if this had been an ordinary debt the Master would have determined it, and it is only because of its complex character, of its requiring scientific investigation, that he could not determine it. The object of these Acts is to prevent parties being sent from one court to another. The Master can act as well as an arbitrator appointed in an action. If the prayer of the petition is granted, he can call in scientific evidence to assist him in determining the questions of fact, and can determine the questions of law himself.

Mr. Daniell, for the Respondent.

The claim is for 10,000*l.*, alleged to be due as the balance of a sum of about 23,000*l.* The Petitioner alleges that an arbitration would be inevitable; that may or may not be; but he has got an order which he ought to have prosecuted; and if he had done so, by this time it would have been seen whether an arbitration would be required. Besides, the order of May left open the question whether there was any legal right at all; that question by the present proceeding is assumed to be concluded. (Counsel for the Petitioner then

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offered to leave the question of there being any legal debt at all, open to be reconsidered by the Master.) This is not the sort of case in which the Court would interfere to exercise its discretion if it has any. The next question then is, whether the Court has power to interfere under the recent Acts. Under the 42nd sect. of the Act, has the Court any power? The Act does not enable the Court to dispense with any proof of facts, but only to obtain the assistance of opinions of scientific persons; the clause does not extend to give power to the *Master*, the words used are the Judge and Court; and these words are placed throughout the Act in contradistinction to the word *Master*. The Court cannot delegate any discretion to the *Master*. The Court might exercise the power to direct its own clerk under the direction of the Judge.

Mr. *Beavan* with him.

The prayer of the petition is in effect to compel an arbitration: to make some architect arbitrator. There is nothing special in this case; the debt, if one at all, is a simply legal debt.

[The *Vice-Chancellor*.—Does the clause of the Act mean that the Court is to take and be guided by the opinion of an architect, or merely to hear what he says to aid the judgment of the Court? Supposing an architect called in; supposing he says, I cannot form any opinion; the Master will be no forwarder.]

Mr. *Jessell*.—I contend that the effect of the Act is to give the same sort of assistance to this Court as is given by the Trinity Masters to the Admiralty Court.

Mr. *Beavan*.—The legislature never meant to give any judicial authority to the scientific person who is to be called in ; besides, the Petitioner has elected his remedy.

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Mr. *J. V. Prior* appeared for Lord *Methuen* (a Defendant), and other persons interested in the estate.

[The *Vice-Chancellor*.—If the witnesses contradict each other, is the Court to take and be bound by the opinion of an architect ?]

Mr. *Prior*.—The claim is to be paid on a *quantum meruit*. That is not the proper question to be submitted to scientific arbitration.

Mr. *Jessell*, in reply.

The Legislature meant this : The Master is referred to conflicting evidence on a given fact, (one, for instance, was, whether a certain rock should have been blown up, whether it was sufficient to support a building,) and that the Master is to decide ; it is a scientific question, and the opinion of a scientific person called to the aid of the Master is one on which he may act. If the Act is not to have that effect, of what use is it ? As to the jurisdiction, the only question is, whether it applies to a reference to a *Master*. The Court is to obtain it as it shall think fit ; it may therefore delegate it to the Master : if this were before the Judge in chambers, it is admitted that he might obtain assistance, and, by the Masters Abolition Act, the Masters are to act as nearly as possible in the mode directed for the Judges in chambers. It will be therefore quite proper that the Master, under the direction of the Court, should have this assistance.

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The VICE-CHANCELLOR referred to the facts stated in p. 216, and then proceeded: The Master then allowed the claim, not as a debt, but as a claim. An application was then made for liberty to bring an action, which was then in fact the only course; the debt was a legal debt, and properly triable at law; and leave was accordingly given. Since that order, the recent Acts have come into operation relating to the amendment of the practice of this Court, and now the claimant asks to discharge the order of May, and that it may be referred to the Master, &c. (His Honor here stated the effect of the prayer of the petition.) The first question is, is it competent to the Court to make such an order? As this is the first application of the kind under the recent Acts, I have thought it right to confer with the other Judges, and am able to state their opinion on the question. The 42nd section of the 15 & 16 Vict. c. 80, is the section on which the question arises; and the question is, whether that section gives the power to call in the assistance of a scientific person to the *Judge only*, whether in chambers or in Court, or whether it authorizes him to delegate to the *Master* the calling in of such scientific assistance, or whether, in referring the matter to the Master, it authorizes the Court to direct particular scientific persons to be called to the assistance of the Master. We are of opinion that the Act did not intend that the Court should delegate the power to the Master, nor direct him to receive particular assistance. The purpose of the Act was to enable the Judges in doing that which they are to do, in substitution for the Master, to have power to call in the aid of scientific persons, &c. Therefore I cannot make an order in the form in which it is prayed by the petition. But the question remains, which of the two alternatives is to be adopted, whether to leave the matter to go on under the order of May to an

action, or whether myself to take the matter in chambers, calling in, if necessary, the assistance of a scientific person; between these two alternatives I have to determine. I have had considerable doubt which of the two courses would be ultimately most convenient to the parties; of course, I had much rather it went to an action in which there would be a reference to arbitration, and the arbitrator might have on the whole better means of determining the question than I should have. But on the whole, I think the best course will be to discharge the order of May, and to take the matter myself in chambers. There the course will be, that as to all matters of mere detail, they will be done by the chief clerk. As to any questions of difficulty, I shall myself determine them with, if necessary, the assistance of such scientific person as I shall think fit to call in; and if questions arise of a sufficiently grave character to require any material discussion, I shall reserve the right of having those discussed in open Court. The order will be, to discharge the order of May, and then (in such form as shall be settled as the proper form) to direct the matter to be disposed of in chambers. The costs of both petitions to be reserved.

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MILDMAY
v.
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METHUEN.

1852 :
11th March.

Practice.
Production of
Documents.

On a bill to set aside a deed filed by one Plaintiff only, praying that, if necessary, it might be taken as on behalf of creditors generally, it appeared that *A.*, claiming under the deed, had a power of appointment, and that she had appointed under her power; the Plaintiff moved for production of documents in the hands of the trustee of the deed, offering to confirm the appointment of *A.* The appointees were not parties. Held, that the production could not be enforced in the absence of those persons.

FORD v. DOLPHIN.

THIS was a motion for the production of documents in the hands of *Leman*, one of the Defendants, as trustee of a deed, the impeachment of which by the Plaintiff, a creditor of the Defendant *Dolphin*, was the object of the bill. The deed was a deed of family arrangement, made by *Dolphin*, by which he settled his property on his wife; *Leman* was a trustee of this deed, and admitted that he had in his possession a bill of costs of *Dolphin's* solicitor against him for the preparation of the deed, and other documents, all of which he alleged he held as trustee of the deed.

Mr. *Rogers*, for the Plaintiff, moved for the production of the bill of costs and the other documents, admitted by *Leman* to be in his possession.

Mr. *Follett* and Mr. *Busk* objected that all the *cestuis que trust* of Mr. *Leman* were not parties, and that to take documents out of the hands of a trustee you must have all the *cestuis que trust* before the Court. The bill showed, that the deed which it sought to set aside contained a power of appointment to Mrs. *Dolphin*, and she had exercised that power to create an incumbrance in favour of two persons named *Stubban* and *Jocelyn*, and they were not before the Court.

Mr. *Rogers* said, the bill admitted the validity of the charge in favour of *Stubban* and *Jocelyn*, and did not seek to disturb it, and was only to set aside the deed as against Mrs. *Dolphin*, subject to the rights of her mort-

pages. The undertaker, on behalf of the Plaintiff, is admitted as the true and valid owner of the mortgages of *Scammon* and *Jacobs*.

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Mr. *Scammon* and Mr. *Jacobs* appeared for Mrs. *Douglas*.

Mr. *Tuley*, for Mr. *Douglas*.

Mr. *Mahon* and Mr. *Seingsma*, for other parties.

Mr. *Fletcher*.

The objection is not removed by that undertaking. The trustee of the deed is asked to produce documents which are the property of all his *cestuis que trust*; he cannot do that, unless they are present to consent. The Plaintiff's undertaking would protect the mortgagees, as between them and the Plaintiff; but the production of their documents may damnify them as between them and other persons; and therefore their trustee ought not to be called upon to produce them in their absence.

The VICE-CHANCELLOR :

As to the documents which the Defendant *Leman* says are in his possession as a trustee under the deed, as a general proposition you cannot move against a trustee to produce documents of such a character, in the absence of his *cestuis que trust*. That is quite clear as a general rule.

This motion was before me on a former occasion, only addressed to Mr. *Leman*, and I then thought that I could not make the order without having his *cestuis que trust* before me.

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If that is the right principle it must be carried out fairly, that is, to its reasonable consequences. Now it appears that in the execution of a power under the deed, Mrs. *Dolphin* has appointed some portion of the estate comprised in it to two gentlemen—Mr. *Stubban* and Mr. *Jocelyn*—by way of security to them for monies advanced by them. They are not parties to this suit. Now, *primâ facie*, the same principle applies to them as to the other *cestuis que trust*, although they are only *cestuis que trust* of a small portion. That, on principle, can make no difference; and *primâ facie* I could not make the order in their absence.

But then it is said, this bill was not intended to impeach the securities of Messrs. *Stubban* and *Jocelyn*. But on that ground I think the language of the bill is so ambiguous that I cannot say that their interest is secure against an attack, even in this suit; and therefore I suggested the undertaking which was given by Mr. *Rogers*, not to impeach these securities. That undertaking might protect these gentlemen, if *Ford* was the only person who could impeach their securities. But this bill is not filed in the ordinary form; it prays that it may be taken, if requisite, as a bill on behalf of creditors generally. What that means specifically I cannot exactly see. But this, at all events, I know: this is a suit to impeach a deed as fraudulent against creditors generally, as well as against *Ford*; any undertaking of *Ford* cannot protect the mortgagees against the claims of the other creditors, who might avail themselves of the discovery obtained to impeach their title.

I think the general principle must prevail. It is said these documents ought not to be considered as in the possession of the Defendant *Leman*, as trustee; and, as

to the bill of costs, it is asked how that can be in his possession as trustee? I think the bill of costs may be most material in impeaching the securities; and if the production of any documents in *Leman's* possession as trustee might assist the Plaintiff in impeaching the deed, it follows that it is possible that such document may be material to support the derivative deeds. At all events, when *Leman* has sworn that all the documents are in his possession as trustee, and there is no suggestion that he has any other character, I cannot distinguish the bill of costs from any other of the documents. Those documents, therefore, which *Leman*, by his answer, says are in his possession as trustee, cannot be produced, and the motion must be refused.

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FORD
v.
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RAWLINS v. M'MAHON.

A PETITION was presented to have a small sum of money (28*l.*) paid under the 44th section of the 15th and 16th Vict. c. 86, to certain persons who were the solicitors of a deceased party to the suit, in order to avoid the expense of taking out representation. The Court thought the clause did not apply to paying money out of Court, and declined to make the order.

1852:
12th November.
Practice.
Chancery
Amendment Act.
The 44th section of 15 & 16 Vict. c. 86, does not apply to paying money out of Court.

1852 :
12th November.

*Winding-up
Acts.*

Contributory.

A. was an allottee of shares in a projected railway company, which failed to obtain an Act, and was never completed. He paid his deposit, but never executed any deed. Accompanying the letter of allotment was a circular from the directors, undertaking to return the deposits if an Act should not be obtained. Afterwards *A.*, at the request of the directors, asking for the continuance of the confidence of the shareholders, wrote to the board, requesting them to continue the undertaking. On the breaking up of the Company, the directors returned the balance of the deposits remaining in their hands, and paid to *A.* on that account 200*l.* *A.* recovered, in an action against one of the managing directors, the remaining 220*l.* Held, that *A.* was not a contributory.

RE DOVER AND DEAL RAILWAY COMPANY,
EX PARTE BEARDSHAW

THIS was an appeal against the decision of Master *Brougham*, putting Mr. *Beardshaw* on the list of contributories. Mr. *Beardshaw* applied for shares, and 200 shares were allotted to him; he paid a deposit of 420*l.*, being two guineas per share. With the letter of allotment he received from the directors the following circular:—

“ Sir,

“ 24th January, 1846.

“ In forwarding you the accompanying letter of allotment, the directors desire to explain that they have delayed issuing any shares until the standing orders of both Houses of Parliament had been complied with, and certain arrangements entered into with the South Eastern Railway Company. The directors have now the greatest satisfaction in stating that arrangements with the South Eastern Railway Company have been concluded, and they are fully justified in asserting that the company will be placed in such a position as to insure its proprietary against loss; and in the event of the passing of the bill, shares in the South Eastern Company will be allotted to the proprietors in lieu of stock in this company. The directors, in making this announcement, feel that the affairs of the company, as

now settled, are on such a basis as to secure important advantages to its proprietors, and to warrant the directors in proceeding to Parliament with the undertaking, with every expectation of success. In the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction.

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“ By order.

S. P. Hook, G. T. Thompson,

“ Joint-Solicitors.”

On the 7th February, Mr. *Beardshaw* paid the 420*l.* to the company's bankers. The directors never succeeded in obtaining an Act; in fact, the scheme was one of the abortive schemes of the period. On the 14th May, 1846, the following letter was sent to the shareholders:—

“ Sir,

“ May, 1846.

“ The directors direct me to call your attention to the advertisement convening a meeting of the shareholders at the *Guildhall Hotel, Gresham-street*, in the city of *London*, on Thursday, the 28th day of May instant, at twelve o'clock at noon precisely, which they hope it will be convenient for you to attend; but should it be otherwise, the directors beg now to solicit a continuation of your confidence in their conducting the affairs of this company, and that you will forward to the secretary your shares, together with a proxy enabling him to vote in your behalf. Should that course not meet your approval, perhaps you will be good enough to hand your proxy to a friend, and authorize him to attend and vote at the meeting on your behalf. I am directed to add, that in order to secure the expenses of the undertaking, which are guaranteed by the South Eastern Company, in pursuance of the arrangements made with them, it is

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BEARDSHAW.

absolutely necessary that the directors should proceed to obtain the Act.

"I am, Sir, your obedient Servant,
"J. M. Hook, Secretary."

Mr. *Beardshaw* then filled up the following form, and sent it to the directors :—

"I do hereby declare that I am an original subscriber for 200 shares in this company, and at this time a holder of 200 shares therein, to which I am entitled as hereunder stated ; and I do hereby request the provisional directors to continue the undertaking. Number which I now hold of my original shares—200. Number of shares purchased by me which I now hold—None. Name in full—*Henry Beardshaw*. Date—May 16, 1846."

On the 28th May there was a meeting of shareholders, and the following report was made to a board of directors meeting on the same day :—

"At a meeting held at No. 7, *Coleman-street*, 28th May, 1846, present, *J. Thompson, Esq., John Brent, Esq., Joseph Thompson, Esq., and John Brent, Esq.*, stated to the board the result of the public meeting of shareholders, held this day at the *Guildhall Hotel, Gresham-street*, in pursuance of *Sir Robert Peel's* resolution, and reported that shareholders, representing scrip to the amount of seventy-four thousand one hundred pounds, approved of the directors proceeding with the bill, and there was not one dissentient.—*H. W. Beauclerk.*"

The bill was ultimately thrown out, and the scheme

abandoned, and the directors determined to return to the allottees the balance of deposit money in their hands. On the 30th July, *Beardshaw* received back 200*l.* of his 420*l.* Two deeds were prepared, the subscription contract, and the subscription agreement; but Mr. *Beardshaw* executed neither. It appeared also, among other things, that in an action against one of the managing directors of the inchoate company for his balance of the 420*l.* he recovered a verdict for the amount.

1882.
I. part
BEARDSHAW.

Mr. *Maites* and Mr. *Smole* now moved to discharge Master *Brugden*'s order, and cited *Bright v. Hut- ton* (c).—Mr. *Beardshaw* is within that case; if anything, this is a stronger case, for here he took with an express contract that he should have his money returned, and not be any further liable. To be a contributory, a man must be liable at law to the creditors of the company or association. They referred to *Carrick's case* (b), and *Robert's case* (c).

Mr. *Glasse*, for the official manager.

In *Bright's case*, the test is not liability to creditors. In the judgment of Baron *Parke*, p. 369, he says, "All the questions of contributories resolve themselves into two simple questions of fact; first,—by far of the most frequent occurrence,—did the alleged contributory make or authorize to be made the contract in respect of which he is called on to contribute, on his own account, or jointly with others? or, secondly, if any one or more entered into the contract on his own or their behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequence of that contract?"

(a) 3 H. L. Cas. 341.

(b) 1 Sim. N. S. 505.

(c) 3 De G. & S. 205.

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Here, there is the letter of *Beardshaw*, of the 16th of May, authorizing the continuance of the company; for every act done after that, *Beardshaw* is liable. Besides, there is the meeting of the 28th May, 1846; *Beardshaw*, by proxy, there voted for continuing the undertaking (a). If *Beardshaw* had signed the deed, there could be no question, because the deed contains an authority; so here, the letter of the 16th of May is an authority, and this takes it out of *Carrick's case*. The undertaking of the directors was, it is true, to return the deposit without deduction; but even if that extended to the expense of obtaining the Act of Parliament, it would not extend to the winding-up expenses.

Mr. *Martindale* with him.

Bright v. Hutton laid down this, that a person, being a provisional committee-man, having shares allotted to him, accepting them and paying his deposit, and doing nothing more, is not a contributory; and it goes no further. But *Beardshaw*, beyond payment on the shares taken by him, did something more; he authorized the continuing of the concern; the request to continue the undertaking is a request to incur the expenses necessary for that continuing. As to the effect of the contract by the secretary, on behalf of the directors, to return the deposits, that is not a contract between the company and *Beardshaw*, but only between him and the directors. *Bright v. Hutton* does not decide that the allottee is to have any money back, but only that he is not liable *ultra* his payment. Here *Beardshaw* has had back money, and he ought to be liable, at any rate, to that extent.

The VICE-CHANCELLOR:

I am of opinion that the name of Mr. *Beardshaw* must

(a) *Parbury's case*, 3 De G. & Sm. 43.

be struck off from the list. [His Honor stated the facts, and then proceeded :]—These are the facts, and the question is, whether Mr. *Beardshaw* has made himself liable to contribute to the expenses of continuing this company and winding it up. With respect to his having had shares allotted to him, having accepted them, and paid the deposit, it must be recollected that the shares which a party applies for, and has allotted to him, and which he agrees to take and to pay the deposits, are shares in a projected company, if it shall be formed. Several persons endeavour to form a company; a party agrees to take shares, and what is his agreement? It is, I agree, that if they succeed in forming the company, I will take shares. The agreement is, if they form the company, I will render myself liable to contribute to the expenses of endeavouring to form the company. It has been decided in *Maudsley's case*, and in *Carrick's case*, that an agreement to take shares, even if accompanied by acceptance and payment of deposits, does not render the party liable to contribute to the expenses of forming the company. If this were all,—if there were nothing more alleged against Mr. *Beardshaw*, it would be unnecessary to refer to the undertaking of the directors of the 24th June, 1846. But it is said that Mr. *Beardshaw* made himself liable by signing or filling up the memorandum or paper sent to him in May, 1846, by which he declares himself, &c. ; it is said that he thereby made himself liable to contribute to the expenses to be incurred in continuing the undertaking. But it is to be recollected how Mr. *Beardshaw* came to sign that paper. He did it in consequence of its being sent to him to be filled up, accompanied by a letter from the secretary, dated some time in May, by which the secretary informed him, that there was to be a meeting on the 28th, hoping, &c. What the directors applied for, then, by that letter, was a

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notification from *Beardshaw* that he continued his confidence in their direction. He adds, I am directed to add, &c. Then there is the undertaking of the directors of the 24th January, on the faith of which *Beardshaw* paid his deposit. How does that undertaking consist with the notion of his being liable to contribute to those expenses? Was that undertaking then done away by the transactions of May? By the letter of May, the directors informed *Beardshaw* that they were to have the guarantee of the South Eastern Railway Company, and that to work that out they must obtain their Act of Parliament; and they ask him to sanction them in doing whatever should be necessary to carry into effect the arrangement with the South Eastern Railway Company. Now does that militate against the effect of the undertaking to return the deposit? The purpose for which the directors wanted this memorandum filled up by *Beardshaw* was only to enable them to take such steps as should be necessary to go on, to get the benefit of the agreement with the South Eastern Railway Company, and they ask him the continuance of his confidence. His former confidence was founded on the faith of the directors restoring the whole deposits, and they ask the continuance of that confidence; and it is endeavoured to be made out that that is a totally new contract, by which he calls on the directors to proceed. It appears to me, that those transactions do not make Mr. *Beardshaw* liable, if he was not liable before. It appears that Mr. *Beardshaw* has actually succeeded in an action against one of the promoters to recover the balance of his deposit. It is difficult to reconcile that with his now alleged liability; but without relying on that circumstance, it is clear that acceptance of shares, and payment of deposit, cannot make Mr. *Beardshaw* liable to contribute to the expenses of endeavouring to form the company, and his

subsequent transactions do not make him liable. The application must therefore be granted, and Mr. *Beardshaw's* name must be struck off the list. Costs of both parties out of the estate.

1852.
Ex parte
 BEARDSHAW.

BARTLEY v. BARTLEY.

BY an order of May, 1852, *Plaintiffs, their solicitors and agents*, were to be at liberty to inspect and peruse, at the house of one of the Defendants, *G. W. Bartley*, and to take copies and abstracts of, or extracts from certain documents in his possession. A motion was now made that these documents might be produced and left with the clerk of records and writs.

Mr. *K. Parker*, for the motion.

Mr. *Hinde Palmer*, for the Defendant.

The material facts appear by the judgment.

The VICE-CHANCELLOR :

The motion now made is founded on this basis:—An order being made, giving to the Plaintiffs, their solicitors or agents, liberty to inspect documents, the Plaintiff has failed to get the benefit of that order, and it is said that the failure has arisen from the misconduct of the Defendant. The Plaintiff has failed because, on going to the house of *G. W. Bartley*, to inspect, and taking with him another person, viz. *Robert Bartley*, another of the Defendants, the Defendant, *G. W. Bartley*, objected to allow *R. Bartley* to inspect,

1852 :
 20th November.

Practice.
Inspection of
Documents.

A plaintiff having an order for himself, his solicitors, and agents, to inspect a Defendant's documents, will not be permitted to take with him another Defendant to assist him in inspecting the documents.

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because he was neither the agent nor the solicitor of *G. W. Bartley*, and was himself a co-Defendant; as such, the Defendant, *G. W. Bartley*, insisted that the Defendant, *R. Bartley*, had no right to inspect, and the Plaintiff could not give him any. The question really comes to this: suppose the documents were deposited with the clerk of records and writs, with the usual order for the Plaintiff, his solicitor or agents, to inspect; and suppose the Plaintiff to go to the office to inspect, and to take with him the Defendant, *R. Bartley*, desiring that *R. Bartley* should inspect the documents, and the Defendant, *G. W. Bartley*, were to object; then, according to the practice of the writ and record clerks office, would *R. Bartley* be allowed to inspect or not? If the Plaintiff would have a right in that office to have the assistance of *R. Bartley* to inspect, he must have the same right under the order of May, 1852. It must be ascertained from the proper officers, what is the practice of the office of the clerks of the records and writs. There may still be a question whether the word *agents*, means any person whom the Plaintiff may choose to nominate for the mere purpose of inspection.

The case stood over to ascertain the practice of the office, and on the 23rd, the Vice-Chancellor stated, that on inquiry it appeared that according to the practice of the writ and record clerks office, *R. Bartley* would not have been allowed to inspect the documents with the Plaintiff; and his Honor decided accordingly, and refused the motion.

RE 10 & 11 VICT. c. 96, AND THE TRUSTS OF
THE WILL OF G. CREED.

THIS was the petition of *G. A. Creed* and *J. Thomas Groves* and his wife; *G. A. Creed* and *Mrs. Groves* being the children of one *George Creed*, the son of *Richard Creed*, a brother of the testator in the matter. *G. Creed*, the testator, gave certain property upon trust for his sister *Fanny* for life, remainder equally between all such of his nephews and nieces, children of his brothers *Thomas* and *Richard* and his sister *Mary*, as should be living at his sister *Fanny's* death, and the lawful issue or legal personal representatives of such of his said nephews and nieces as should, at his sister *Fanny's* death, be dead.

G. Creed, the testator, died the 12th February, 1838. *Fanny Creed* died the 21st January, 1838. *Richard Creed* had two children, *G. Creed* the younger, and *Harriet Ann Creed*, afterwards *Lowther*; *G. Creed*, the younger, had three children, viz., the Petitioners *G. A. Creed* and *Eliz. Groves* and *Richard L. Creed*, who died on the 12th July, 1831, an infant of the age of eight. In 1829, *G. Creed* the younger became bankrupt, and on the 9th November, 1829, he left *England*, and went to *New York*. In 1831, Mr. *Lowther*, the brother-in-law of *G. Creed* the younger, received a letter from a stranger, dated 16th June, 1831, from *New York*, soliciting aid on behalf of *G. Creed* the younger, de-

1852 :
23rd & 24th
November.

Death,
Presumption of
Evidence.
What Evidence
affords
presumption of
Death.

A. left this country on the 9th November, 1829. On the 16th June, 1831, his brother-in-law received a letter from *America* on behalf of *A.*, describing him as having changed his name to *B.* Three months after this, *A.'s* wife sent a letter to him, addressed to him as *B.*, by the hand of a friend, who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family.

Held, that on this state of facts, there was not sufficient information to ground presumption of death, still less of the particular period of death.

1852.

In re
CREED.

scribing him as then having taken the name of *G. Cooke*. The petition then contained these allegations: "That about three months after the receipt of the said letter by *G. Lowther*, the wife of said *G. Creed* wrote a letter addressed to him by the name of *G. Cooke*, and sent such letter by a friend to *New York*, who then made inquiries for him but without being able to obtain any information respecting him, or even hearing of him; and such letter was afterwards brought back to his said wife to *England* by the said friend. That some time back it was reported by a Mrs. Col. *Howard* that the said *G. Creed* had been seen by her son in 1831, at *New York*, in the company of some strolling players, and in great distress. These allegations were supported by the affidavits of the Petitioners only; and it did not appear that any of the family had, and indeed it was admitted at the bar that they had not, made any other inquiries. The question was, whether *G. Creed* the younger was to be presumed to be dead, and if dead, whether he died within six years and eight months from the 16th June, 1831; in which case, he would have died before the testator, and the Petitioners, as the issue of *R. Creed*, would take; or whether he must be presumed to have lived for seven years from the 16th June, 1831, in which case he would have survived the testator, and taken an interest; and then his assignees would be entitled. The petition was to have half of a sum, paid into Court under the trusts of the will of *G. Creed*, paid to the Petitioners in equal moieties.

Mr. *Chandless* and Mr. *Walford*, for the petition, cited *Webster v. Birchmore* (a), *Sillick v. Booth* (b), *Dowley v. Winfield* (c), *Cuthbert v. Purrier* (d), *Nepean*

(a) 13 Ves. 362.

(c) 14 Sim. 277.

(b) 1 You. & Col. C. C.

(d) 2 Phil. 199.

v. Knight (a), as to presumption of death. Either the assignees of *G. Creed* the younger, or his children, are entitled. There is no information as to the actual period of *G. Creed's* death. The rule as to presumption of death is this: if the party has not been heard of for seven years, he is presumed to be dead, but no particular period for his death is to be presumed. The balance of the evidence is in favour of the presumption of his dying in the first six years and eight months; for the wife made inquiries immediately after the 16th June, 1831, and could learn nothing.

1852.
In re
CREED.

Mr. *Pitman*, for the trustees, submitted the question to the Court.

Nov. 24.

Mr. *Daniell* and Mr. *Roxburgh* for the assignees of *G. Creed*.

The Petitioner's title assumes that *G. Creed* died before the 12th February, 1838, and they must make out that affirmatively. The only evidence is the letter of the stranger, of June, 1831.

The VICE-CHANCELLOR interposed, and said that unless the parties could agree in stating that no further information could be obtained, he thought there had been no sufficient inquiry to justify any order. The Petitioners had done nothing in the way of effectual inquiry. As the matter stood, the Court would refuse to give the fund to the Petitioners. Of course, on that petition, it could make no order in favour of the assignees; but his Honor said, if the petition were theirs, he should make no order without further inquiry. The case was finally arranged out of Court.

1852 :
25th November.

*Practice.
Chancery Im-
provement Act.
Supplemental
Order.*

The birth of one of a class, entitled as such after the institution of a suit, is within the 52nd section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree.

FULLERTON v. MARTIN.

MR. FREELING applied for a supplemental decree under the 52nd section of the Chancery Act. All the children of certain persons were necessary parties to a suit, as being all interested in certain property, and all were parties, except one recently born. A decree had been made, and proceedings had been taken in the Master's office, but there had been no proceedings since the birth of the infant; so that merely the usual supplemental decree was wanted. The question was, whether this case was within the section.

The VICE-CHANCELLOR said there was a change of interest, and the case was clearly within the spirit, if not within the actual words of the statute, and made the order.

HOWARD v. HOWARD.

THIS was a motion to examine witnesses *vivá voce*, under the 39th Order of the 7th August, 1852, issue having been joined before the Orders came into operation. It appeared that in July it had been agreed between the solicitors of the parties before the Master, that publication should not pass till the 2nd November, on the ground that then the new system of practice would come into operation; and the Master made an order accordingly. It was insisted on the one side, that the intention and agreement were to examine under the new practice; on the other, that the intention and agreement were merely to postpone the question under what practice the examination should be conducted.

Mr. Follett and Mr. Gordon, for the motion.

Firstly, There is an actual agreement between the parties that the evidence should be taken under the new practice. Secondly, If there was no such binding agreement or consent, it is more desirable in this case that evidence should be taken according to the new practice. (They cited *Mackintosh v. Great Western Railway* (a).) The real question in this case is, whether a partnership existed, and that fact depends on conversations and on various circumstances leading to a great conflict of

(a) 16 Jur. 1012.

cation was not an agreement to adopt the new practice; but, in the absence of special reasons to the contrary, there being a *probability* of advantage in applying the new practice, it ought, according to the intention of the Act, to be applied.

1852:
25th November.

Practice.
Application of
39th Order of
7th August,
1852, where
Issue joined be-
fore the Order.
Witnesses.
Leave to exam-
ine under 39th
Order.

In a cause at issue before the Orders of 7th August 1852, the parties, in July 1852, agreed to postpone publication till the 2nd November, on the ground that the new practice would then come into operation. The case was one in which it was not clear, but *probable* that oral examination might be the most effective:

Held, that the postponement of publi-

1852.
HOWARD
v.
HOWARD.

evidence. Interrogatories were filed in July; nothing was done till the 12th of November; and as soon as notice was given to us by the Plaintiff of his intention to proceed, we protested and gave notice that we should apply for leave to examine witnesses under the new practice.

Mr. *Bacon* and Mr. *Toulmin*, for the Plaintiff.

Two points are made. First, It is said there is an agreement before the Master, ratified to some extent by the Master's order of the 12th July. Now the Chancery Act had just then passed. (They referred to the 28th section.) The agreement to postpone publication was therefore reasonable, because Orders were expected. But it was not an agreement to *adopt* the new Orders. The 39th Order requires *consent*. That means consent given under the Order. Such a consent as the Defendant alleges, not only was not given but could not exist. It would be a consent to act under Orders not yet existing, and such a consent is not within the 39th Order. Then on the second point, as to this case being one on which it is more fit that the new practice should be adopted. However that may be, interrogatories have been filed and proceeded upon, and some witnesses have been examined. To waste all these proceedings now, would be inexpedient, and both delay and expense will be saved by going on under the old practice; nor is there in fact anything special in the case to require oral examination.

The VICE-CHANCELLOR:

The parties were before the Master in July last, and then a discussion took place, of the effect of which the solicitors for the parties have been led to form different estimates. The view taken on the one side is this: that it was arranged that when the new practice, then

expected, should come into operation on the 2nd of November, the parties were to proceed under that new practice. On the other side the agreement was understood to be that things should remain in *statu quo* till the 2nd of November, having reference to the fact that then the new practice would come into effect, and that then it was to be determined how matters should proceed. I cannot assume that there was any actual agreement by the Plaintiff, that the examination of the witnesses should take place under the new practice. But according to what is said on behalf of the Plaintiff himself, it seems that the reason for the adoption of the Master's suggestion that no witnesses should be examined till November, was the suggestion of the Plaintiff's solicitor that the new practice would then come into operation, a fact of which both parties had notice from the Act itself, though what the details would be they did not then know. Now the 28th section of the Act abolishes entirely the old practice. The 29th and subsequent sections point out what is generally to be the mode of examining witnesses. It could not be known when the parties were before the Master, within what time after issue joined, the Lord Chancellor would require notice to be given. But this they knew, that the new system would come into operation, and it was not agreed definitively that the new system should be adopted, but it was agreed that it should then be determined in what way they should proceed. That I think was the effect of the agreement. No communication was made to the Defendant until the 10th of November, when the Plaintiff gave him notice to produce documents, and that on the 12th he should proceed to examine witnesses under the old system.

1852.

HOWARD
v.
HOWARD.

1852.

HOWARD

v.

HOWARD.

observed that the Chancery Amendment Act, by the 28th section, applies to *all* cases, including cases in which issue was joined before, as well as those in which it was joined after the Orders; and that the 39th Order would seem therefore to repeal that, but that it did so by force of the 63rd section of the Act. His Honor then proceeded.

The Plaintiff then, on the 10th November, was proceeding under the old system. The Defendant immediately gave him notice not so to proceed, alleging the agreement. This the Plaintiff denied, and insisted on going on; whereupon the Defendant goes in before the Examiner and objects, and the Examiner proceeds with the examination, in which I think he was right, as there was not any positive agreement, and he had no jurisdiction to depart from the old practice. The Defendant then asks for time to produce the documents, and that is referred to against him as showing acquiescence, but I do not think that amounts to acquiescence. On the 15th he gives notice of motion for the 19th, the earliest day for which he could give notice; so that I do not think that the conduct of the Defendant has at all placed him in a position on which he is concluded from making this application to the Court. Then is it a case in which there is reason for supposing that it will be more expedient to adopt the new than the old practice? I am, of course, unable, without hearing more of the pleadings, to say precisely what are the matters put in issue; but I see enough, from what is stated, to say that it is a case in which it is at least likely that the purposes of justice will be best served by oral examination and cross-examination. Ought I then to refuse it on the ground that proceedings have been already taken under the old system? If any expense had been incurred by reason of the Defendant's ne-

glect to take any proper step, it might be so ; but I see no such neglect. For as there was, at least, an agreement that the matter should stand over, the Defendant had a right to expect some communication before any step was taken. It was the Plaintiff's fault not so to communicate with him before any material expense was incurred. The Defendant protested as soon as he was aware of any step, and did not delay his application. There is no reason then on that ground for not granting the application ; and this being a case in which there is at least a *probability* that the new system of examining witnesses may be most effective, and the legislature having said that the new mode is the best in the absence of any special reasons for not adopting it, I shall, following the case already decided to which I have been referred, make the order. The costs to be costs in the cause.

1852.

HOWARD
v.
HOWARD.

1852:
11th November.

*Statutes, Con-
struction of.
Railway
Clauses Con-
solidation Act.
Jurisdiction.*

A Railway Com-
pany were build-
ing an embank-
ment more than
five feet above
the level, ac-
cording to the
11th and 12th
sections of the
Railway Clauses
Consolidation
Act. They had
not given the
notice required
by the 12th sec-
tion, but had ob-
tained the con-
sent required by
the 11th. The
Court put them
on terms to
take the opinion
of the Board
of Trade, sub-
mitting to such
order as this
Court should
thereafter make,
otherwise an in-
junction would
go to restrain
the company
from proceeding
with the em-
bankment.

PEARCE v. WYCOMBE RAILWAY COMPANY.

THIS was a motion for an injunction to restrain the railway company from making or proceeding with the deviation in the bill mentioned, from the level of the *Wycombe* Railway, beyond the limits of five feet in the Railway Clauses Consolidation Act, 1845, mentioned.

The Plaintiff was the owner of a house near which the Defendants' railway was constructed. The Defendants, the company, were building an embankment to carry the *Wycombe* Railway over the common road, and building it much more than five feet above the level, within the meaning of the 11th and 12th sections of the Railway Clauses Consolidation Act. Whether the embankment *prejudicially* affected the Plaintiff's land within the 12th section was matter of conflicting evidence; but it was admitted that the company had not given the notice required by the 12th section. They had the consents required by the 11th section.

Mr. *Swanston* and Mr. *Nicholls*, for the Plaintiff.

The circumstance of the company not having given the notice required by the 12th section is conclusive. The proper tribunal to decide the question whether the land was *prejudicially* affected or not, is the Board of Trade, and the company proceeding without having given the required notice, the Plaintiff has a right to an injunction until that shall have been done.

Mr. *Malins*, for the company, cited the 6th and 66th

sections of the Railway Clauses Consolidation Act, and the 68th of the Lands Clauses Consolidation Act. As to the 11th section of the Railway Clauses Consolidation Act, the Plaintiff does not come within it. He is not an owner within that section. As to the 12th section, the words, *prejudicially* affected, mean prejudicially within the 6th section of the Railway Clauses Consolidation Act, and the 68th section of the Lands Clauses Consolidation Act. The company is not proceeding consistently with the Act. The Plaintiff has therefore no right to come for an injunction; he must bring an action.

1852.
 PEARCE
 v.
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Mr. *Jessell*, with him.

Firstly, there is no title in the Plaintiff to sue at all. Secondly, if there is, this is not a case for an injunction. Thirdly, the delay precludes him. The Plaintiff rests on the 12th section of the Railway Clauses Consolidation Act; the question on that is, What is meant by *prejudicially* affected? The words *prejudicially* and *injuriously* are used by the Act indifferently [he referred on this point to the 66th section]. This is a case without the Act. Could the Plaintiff have maintained an action before the Act? If not, he is not *prejudicially* affected, which must mean *prejudicially* affected at law, independently of the Act; the question then is, Is this a private nuisance? and this the Court may decide; Chancery Improvement Act, 1852, sect. 62. Secondly, if the Plaintiff has any title at all to sue, that is, if he has suffered legal injury, it is clearly not irremediable injury. The evidence shows there is no pecuniary injury to the value of his house. The balance of inconvenience is against granting the injunction, because it would stop the transit on the railway. Thirdly, as to the delay, the embankment was commenced on the 20th of June; on the 26th July there was a public meeting, at which the Plaintiff

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was present, to take the matter into consideration. On the 20th of July, he sent a notice objecting to the embankment; the reply was from the Defendants, who wrote to him that terms would be proposed. Then the Plaintiff applied to the Board of Trade, and that was a commencement of litigation which he ought to have pursued without delay. On the 28th August, he found that the Board of Trade had not or declined to use jurisdiction, and he then gave a notice threatening an application to the Court of Chancery unless the Defendants desisted: after that he did nothing till the end of October. Lastly, the prayer of the bill is for an injunction to restrain the company *until they shall have given proper notice*. We gave them notice on the 1st November, but the notice of motion goes beyond the bill; it cannot therefore be supported. (It was stated that the Board of Trade would undertake the adjudication.)

Mr. *Swanston*, before replying, said he consented to submit the question to the Board of Trade; the injunction going in the mean time, or the company undertaking to abide by the order of the Court after the decision of the Board of Trade.

The COURT intimating that if the company would not submit to the order of the Court they could not be permitted to go on with the embankment pending the inquiry before the Board of Trade, the following order was ultimately arranged. The Plaintiffs and Defendants undertook to raise no objection to the jurisdiction of the Board of Trade, and to abide by the decision of that Board; and also to abide by such order as this Court should think fit to make if the Board of Trade decided. If the Board of Trade refused to adjudicate, liberty for either party to apply; the Defendants undertaking in that

case to abide by such order as this Court should make as to their works, and on these terms the motion to stand over.

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DOVER AND DEAL RAILWAY COMPANY,
EX PARTE FRANCIS MOWATT.

1852 :
2nd December.
Winding-up
Acts.
Calls.

THIS was a motion to discharge an order of the Master, directing *F. Mowatt* to pay a call of 1*l.* 7*s.* per share.

Mr. *Daniell*, for the motion, contended that Mr. *Mowatt* was not liable to pay any call. This was a scheme in concurrence with the South Eastern Railway Company. The promoters entered into negotiations with the South Eastern Railway Company, resulting in arrangements between the two companies. The subscribers' agreement was dated the 1st January 1846; Mr. *Mowatt* executed it on the 29th January, no shares were then issued, nor was any allotment made. On the 24th January 1846, a letter was written by the joint solicitors of the *Dover* and *Deal* Railway Company, and a copy of this letter was sent to Mr. *Mowatt*. It was as follows:—"In forwarding you the accompanying letter of allotment, the directors desire to explain that

An allottee of shares in a projected railway company paid on them; he also executed the subscribers' agreement, a deed under seal; but he did so on the faith of a letter written by the provisional directors before the execution of the deed, by which they undertook to return the whole deposit if the Act should not pass. The deed was in the usual

form, between all the shareholders with trustees, to perform the covenants, and contained a covenant to indemnify the provisional directors whether the Act should or should not pass. Held, that the deed, being a contract by each shareholder with all the others, its effect could not be destroyed in favour of any shareholder, by a contract between him and a certain number of shareholders; and consequently, the allottee who had signed it, was not protected by the letter of the provisional directors, against a call.

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they have delayed issuing any shares until the standing orders of both Houses of Parliament had been complied with, and certain arrangements entered into with the South Eastern Railway Company had been brought to a conclusion. The directors have now the greatest satisfaction in stating that arrangements with the South Eastern Company have been concluded, and they are fully justified in asserting that the company will be placed in such a position as to insure its proprietary against loss; and in the event of the passing of the bill, shares in the South Eastern Company will be allotted to the proprietors in lieu of stock in this company. The directors, in making this announcement, feel that the affairs of the company, as now settled, are on such a basis as to secure important advantages to its proprietors, and to warrant the directors in proceeding to Parliament with the undertaking, with every expectation of success. In the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction.

(Signed) { *S. P. Hook,* } Joint
 { *G. T. Thompson,* } Secretaries."

Now Mr. *Mowatt's* case is this. The official manager relies on the subsequent agreement, he says that regulates the liabilities. Mr. *Mowatt* says this is not a call for *debts*, but for the expenses of winding up, and his liability on the subscribers' agreement is to be taken in conjunction with the letter of the 24th of January 1846. Under the 83rd section of the Winding-up Act the Master is to have regard to legal and *equitable* liabilities. He cited *Gay's case (a)*. He relies on the

(a) De G. M'N. & Gordon, 1 Appl. Cas. Chanc. 347.

letter of the 24th January 1846, the resolutions of the directors, and the letter of allotment, the subscribers' agreement, and the parliamentary contract. The execution of the subscribers' agreement by Mr. *Mowatt*, being subsequent to the letter of the 24th of January 1846, that letter must be treated as incorporated in the deed.

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Mr. *Roxburgh* with him.

There is no question here between creditors of the company and the appellant; the only liability of *Mowatt*, if there is any, is by way of indemnity to those members of the company who are liable for debts. But he is not so liable, and therefore he is not liable to any call. The letter of the 24th of January is the basis of the contract; *Mowatt's* signature to the subscribers' agreement was necessary for soliciting the bill, therefore the mere fact of such signature does not constitute any liability; only an allotment of shares will have that effect, and then you must see the terms of allotment. In effect, the persons now claiming an indemnity are the very persons who contracted to return the whole of the deposits if an Act could not be obtained. If there had been no signing of the agreement, clearly there could have been no claim. But the agreement was founded on the representation contained in the letter of January 1846.

Mr. *Glasse*, for the official manager.

The point is simply this: whether where parties agree by parol and then enter into a deed, silent on the terms of the parol agreement, the parol agreement can be looked at to control the deed. There is no evidence when Mr. *Mowatt* received the letter, though it is admitted to have been received; and their case rests upon the deed having been executed after and on the faith of

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the agreement contained in the letter. Take it either way, the deed is the contract, and is not to be construed in reference to the parol agreement. The subscriber's agreement signed by Mr. *Mowatt* on the 29th January, and again in February, provides for the indemnity of the provisional directors. And there is a clause that whether the Act *shall or shall not pass*, the parties shall indemnify the provisional directors against costs, &c. He cited *Ex parte Markwell (a)*.

(The *Vice-Chancellor*.—Their case is, that he executed the deed upon the faith of the letter; that they were contemporaneous acts.)

Mr. *Glasse* cited Sugden's *Vendors and Purchasers*, sect. 8, 11th edition, to show that where there is a deed between parties, in the absence of fraud, parol evidence cannot be looked at.

Mr. *Selwyn* with him.

If they show a right to set the deed aside, they have not taken the right course; they admit the execution of the deed, and yet seek to escape from it. It might be that the directors had given a guarantee which bound them, but that is no argument against the other parties; the question is here between Mr. *Mowatt* and the *whole* of the parties. It would be a fraud on that deed if a parol arrangement between some of the subscribers could prevail. How can one contributory say that, by an independent arrangement with the directors, he can escape his liability to the other parties executing the deed? The question is between Mr. *Mowatt* and the whole body, each of whom has a right to say he executed the deed in consideration of every other party to it executing it. Besides, all the shareholders were cognizant of the

(a) 16 Jur. 989.

steps taken by the official manager, and allowed them for their own benefit, and then it is said they have a right to refuse to share the costs: *Gay's case* (a). Besides, the guarantee is no more than a statement that the South Eastern Railway Company had given a guarantee to the directors.

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Mr. *Daniell*, in reply.

The VICE-CHANCELLOR :

This is an application to discharge an order made by the Master, for a call on the contributories generally, and among others on Mr. *Mowatt*. It is insisted that the Master ought not to have made that order, on the ground that, looking at the equities between the parties, there is a certain body of directors who ought to be made liable in the first instance, by virtue of a guarantee given by them to Mr. *Mowatt*, as well as to other shareholders.

The call is made generally, not in terms either specifically for debts or for costs, but generally. However, there appears to be evidence sufficient to show that, looking to the question of costs alone, there is a claim for costs amounting to much more than the amount of the call made by the Master. The case then stands thus:—It is contended, as between the whole body of contributories represented by the official manager and Mr. *Mowatt*, one of the contributories, on behalf of the general body of contributories, that Mr. *Mowatt*, as between him and them, is liable to pay the call. The ground alleged is, that Mr. *Mowatt* executed a deed, by which he undertook that the expenses incurred in endeavouring to form the company should be paid by Mr. *Mowatt* and the other

(a) 5 De G. & S. 122.

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parties to the deed. Mr. *Mowatt* admits the execution of the deed, and on the face of it it is admitted that he would be liable; but he refers to the circumstances under which he executed it, and alleges that he did so on the faith of a guarantee given by the body of directors, by which they undertook that he and the other shareholders to whom that guarantee was given, should have the whole of their deposits repaid in case the Act of Parliament should not pass. Now, first, looking at both documents, that is, the letter of the 24th January 1846, and the prospectus, I think there is reason to conclude that the guarantee was given with this view. The South Eastern Railway Company, though not promoters of this company, were interested in it, and in its success; and when the directors gave this guarantee they meant to say, the South Eastern Railway Company having undertaken, with regard to us as promoters, to indemnify us against the liabilities which may be incurred in obtaining an Act, and we having this guarantee from them, we guarantee you, the shareholders, against such liabilities, if the Act is not obtained. In both instruments allusion is made, not in express terms, still with sufficient clearness, to the directors having the guarantee of the directors of the South Eastern Railway Company; and then they go on by a subsequent clause to say that they, the directors, will guarantee the allottees. [The Vice-Chancellor commented on the language of the prospectus and of the letter, and then proceeded:—] The effect of this is, that what the directors intended was this: they say, we, the directors, have entered into arrangements with the South Eastern Railway Company, by which they will see us indemnified, and, having that indemnity, we will undertake with you, the shareholders, that you shall have your deposits returned. Now I have no intention of saying that the guarantee of the directors

to the allottees is not to take effect, because the directors have failed in enforcing their guarantee ; but still I think it is to be collected, that the reason why they gave a guarantee is, because they had the guarantee of the South Eastern Railway Company ; but this guarantee of the directors was a guarantee to each allottee, separately and distinctly to each, and to any one who did not receive it it would be no guarantee at all ; that is, it would not be a guarantee on the faith of which he could be said to have executed the deed.

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Assuming (though the fact is questionable) that Mr. *Mowatt* read the letter of the 24th January before he executed the deed, and that he executed the deed on the faith of the agreement contained in that letter, that is, on the faith of the guarantee given by the directors, being a certain number of the promoters, that he should receive back his deposit ; this may be a good guarantee by those persons ; but then he has also entered into an arrangement by which he and each of the other contributories, guarantees to all the contributories to contribute to the expenses ; and the other contributories say to him, we never *all* gave you a guarantee to return your deposits. Look for that purpose to those promoters who did give it you ; we as a body did not.

Now I do not see that it is clearly proved that all the contributories did receive the letter of the 24th January. The secretary indeed says that, to the best of his belief, he sent it to all ; but that is not even positive evidence that he *sent* it to all, and there is no evidence that all received it. But even if all did receive it, it amounts to this, a guarantee by the promoters to all the shareholders ; but that would be no answer to a claim by all the shareholders to have carried into effect the pro-

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visions of the deed by which they all contract with each other.

I must assume that Mr. *Mowatt* knew the terms of the deed. It is not suggested, and if it were, he could not be heard to say that he was not perfectly cognizant of its terms. He knew that by it all the parties contracted with each other, through the trustees, to contribute to the expenses.

I think, therefore, on the whole, that the Master was right in finding Mr. *Mowatt* liable, and I must refuse the motion ; and, according to the usual course in such cases, with costs.

OXFORD, WORCESTER, AND WOLVERHAMPTON RAILWAY COMPANY v. SOUTH STAFFORDSHIRE RAILWAY COMPANY.

1852 :
4th and 6th
December.

Statutes.
Construction.

THE 23rd section of the South *Staffordshire* Railway Act, 9 & 10 Vict. c. 300, was as follows :—" Whereas plans and sections of the railway showing the line and level thereof, and also books of reference containing the names of the owners or reputed owners, lessees or reputed lessees and occupiers of lands, through which the same is intended to pass, have been deposited with the clerks of the peace of the counties of *Stafford* and *Worcester*, and with the clerk of the peace for the county of the city of *Lichfield* ; Be it enacted, that subject to the provisions in this and the said recited Acts contained, it shall be lawful for the said company, and they are hereby authorized, *to make and maintain the said railway and works in the line and upon the lands delineated in the said plans, and described in the said books of reference, and to enter upon, take, and use the said lands or such of them as shall be necessary for such purpose.*"

A railway company had power "to make and maintain the railway and works on the line and upon the lands delineated in the parliamentary plan, and described in the books of reference, and to enter upon, take, and use the said lands, or such of them as should be necessary for that purpose ;" but they were not to enter upon, take, or

use any of the land or property of a certain pre-existing railway company, or in any manner to alter, vary, or interfere with that railway or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized in manner in the said Act authorized, and not otherwise ; one of the clauses of the Act giving certain powers to the company for effecting a junction with the pre-existing railway.

Held, that there being nothing to show that it was absolutely necessary for the company, in order to effect the junction, it had no power to take as owners certain lands over which the line of the pre-existing railway actually passed ; but there was a right to enter upon such lands, by way of easement, for the purpose of effecting the junction.

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The material part of the 24th section was, "that the line of railway to be so made and maintained shall be the following; that is to say, firstly, a railway commencing *at or by a junction with the intended line of the Oxford, Worcester, and Wolverhampton railway at Dudley, in the county of Worcester*, and terminating in the parish of," &c.

The 27th section was, "that all communications between the railway hereby authorized, and the Grand Junction Railway, and the *Oxford, Worcester, and Wolverhampton* Railway, respectively, shall be effected in a substantial and workmanlike manner, by means of connection rails and points (of the construction most approved), laid in the manner most approved, and to the reasonable satisfaction of the engineers for the time being of the said other railway companies respectively."

Of the 28th, the material part was, "that all such communications, openings, and works shall not only be in the first instance made and done, but shall also from time to time be altered, amended, repaired, and maintained, to the reasonable satisfaction of the engineer for the time being of the said other railway companies respectively, on each occasion, and in such manner and form, and by such ways and means only, as shall not in anywise prejudice or injure the said other railways respectively," &c.

The 29th section was: It should not be lawful for the company, "either permanently or temporarily *to enter upon, take, or use any of the land or property of the said Grand Junction Railway Company, or the said Oxford, Worcester, and Wolverhampton Railway Company, or in any manner to alter, vary, or interfere with the*

said Grand Junction Railway or the said Oxford, Worcester, and Wolverhampton Railway, or any of the works appertaining thereto respectively, save only for the purpose of effecting the junction hereby authorized in manner aforesaid, and not otherwise."

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The 20th section saved (except as thereby expressly authorized) the rights of the two other railway companies.

This was a motion to restrain the Defendants from continuing or keeping possession of the land situated at *Dudley* on the line mentioned, and of which possession had been delivered to the Defendants by the sheriff of the county, and from making and constructing a junction with the Plaintiffs' railway upon or over such land or any part thereof, and from doing any work, or making or constructing any part of the South *Staffordshire* Railway upon or over such lands or any part thereof, and from taking any proceedings for the purpose of compulsory purchase by the Defendants, of the said land.

Counsel on both sides went at some length into questions of negotiation between the parties; but those questions formed no part of the ground of the decision, and are not material.

Mr. *Bethell*, Mr. *Malins*, and Mr. *Bovill*, for the motion, argued upon the construction of the clauses referred to, that the Defendants had no right either to take the land in question, or to fix the point of junction; that was to be done by the Plaintiffs' engineer.

Mr. *Rolt*, Mr. *Follett*, and Mr. *Speed*, for the Defendants.

We claim a right to purchase, but that is not so im-
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portant to us as fixing the point of junction. Substantially now, the question is, where the junction is to be made. We care principally about joining at the point A., and we say that, on the construction of the Act, we have a right to select the point. Upon the deposited plan, A. is the point marked (a). The Railway Clauses Act, 15th section, gives power of deviation to the company. Our company had power to diverge within the limits prescribed. [They commented on the 27th section of the Defendants' Act.] By that section authority is given to the Plaintiffs' engineer to see to the *mode* of making the junction; not to fix the *point* of junction.

The 28th section has the same effect. That refers to *alterations*; that means alteration of *construction*, not of place. If the Plaintiffs had no power originally to fix the place, they have no power to *alter* it. The latter part of the clause indeed gives the engineer no power at all. The 29th section only refers to the Defendants' right to *take and use* the lands. The construction urged on the other side is, that there is, first, a positive prohibition to take the land, and that the saving applies only to its immediate antecedent. The 23rd section gives an express power to take the land; the Plaintiffs' construction cannot, therefore, be the true construction of the 29th. That section only qualifies both rights; the right to take the land, and the right to alter, vary, or interfere with the Plaintiffs' railway. Wherever the Plaintiffs go by deviating, we have a right to follow them. On the construction of the Act we have a right to join at any point within our limits of deviation; and have

(a) A. was a point on the Defendants' line, and close to it was a small triangular piece of land, over part of which

their line ran, and which the Plaintiffs claimed the right to purchase and take.

for that purpose, at any rate a right to an easement on their land. The Plaintiffs say that they have a right of saying where the junction shall be effected. They claim, therefore, in effect to dictate our deviation. Now that right is not given to the Plaintiffs. The 27th section only affects the *mode* in which the junction shall be effected; the mechanical details, not the locality. The 28th goes no further; it shows that the *engineer* must be satisfied as to the *mode* in which the work is done. The selection of the locality is therefore, by inference, left to some other person; viz., to the Defendants. The clause that the Plaintiffs' *railway shall not be injured*, would be useless and surplusage, if the Plaintiffs are right in saying that they are to dictate not only how the junction is made, but where it is made.

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But we say we have a right to purchase. The 23rd and 24th sections empower us to make the railway on the line, and upon the land contained in the parliamentary plan, and we have a right of deviation; and we might have deviated, still effecting our junction at A. as the limit.

Mr. *Bethell*, in reply.

The only point really for adjudication is, have the Defendants a compulsory power to take the small triangular piece of land? At what point the junction is to be made is not before this Court. That must be decided by another jurisdiction. The claim by the Defendants has been always to have the land as owners, and then to make the junction upon it. But the question of junction must be settled to the reasonable satisfaction of the Plaintiffs' engineer. What the Defendants have attempted to do is to take the land, and so to determine the question of the point of junction.

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The VICE-CHANCELLOR :

I am asked by the Plaintiffs in this case to grant an injunction to restrain the Defendants from continuing or keeping possession of the land mentioned in the bill, &c.

On this notice of motion two points were argued. The first question argued was, whether the Defendants have a right to be owners, and to be treated as owners, of a certain piece of land of a triangular form, and coloured red on the plan. The second question was, whether, irrespectively of that, the Defendants have a right to effect a junction with the Plaintiffs' railway at the point they, the Defendants, choose to elect. Now as to the first question, the Defendants' leading counsel said, that although he claimed to be entitled to take the land as owner as a matter of right, yet it was of little consequence to the Defendants, provided they effected their junction at the point they desired.

The Plaintiffs' counsel, in reply, said: We do not ask the Court to determine where the junction is to be effected, we only ask that the Defendants may be restrained from taking and holding the piece of land in question, as owners.

It appears to me that the Plaintiffs thereby admit that the second point must be given up; and therefore, as the Plaintiffs only ask the Court to determine the question of the Defendants' right to take possession of the land, I shall only address myself to that question, and it depends mainly on the construction of the clauses in the Act of Parliament.

The first section of the Act, which bears on the question of the right of the Defendants to take the Plaintiffs' land as owners, is the 23rd. That gives a right

to take and use any lands described in the parliamentary plans and the book of reference; then the 24th points out the commencement of the line intended. The line of the railway is to commence at or by a junction with the intended line of the *Oxford, Worcester, and Wolverhampton* Railway. Then the 27th refers to the communications between the Defendants' railway and the Plaintiffs'.

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There has been much argument upon the 27th and 28th clauses, but those arguments bear upon the question where the junction between the railways should be, and have no bearing upon the question whether the Defendants have a right to take possession as owners, of any part of the land of the Plaintiffs. Now I do not mean to express any opinion on the question where the point of junction should be; the Plaintiffs' counsel have treated that as belonging to another jurisdiction, and I think it probable that that is so, and I shall therefore not say what I consider the construction of the Act on those points.

I proceed then to the 29th section of the Defendants' Act.

Now when the Defendants' Act passed, the Plaintiffs' line had not, it is true, been made, but they had contracted for, and were owners in equity of the triangular piece of land in question; they had paid the money for it, and were in possession; and although no conveyance was executed, they were the equitable owners of the land.

The Vice-Chancellor read the 29th section of the Act, and proceeded:—

Now it is contended on behalf of the Plaintiffs, that the clause at the end of this section, "save only for the purpose," &c., is in point of construction, to be consi-

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dered only as relating to the latter of the two preceding branches of the sentence; that it is not to be construed as referring to that portion of the sentence which prohibits the *South Staffordshire* Company from "entering upon and taking any of the land or property," &c.; but only to that branch which prohibits that company from "altering, varying, or interfering," &c., &c. If that were the sound view the consequence would be this: not only the Defendants could not take possession of, but they could not enter upon the lands of the Plaintiffs. They would be prohibited from entering upon any part of the lands of the Plaintiffs for the purpose of effecting that junction, which it is admitted they are authorized to make. Now observe, supposing the Defendants had only a single line, that line must have two trams; then if they had to join another railway, the outer tram must actually cross the line of the other railway before they could join; and for that purpose it would be absolutely necessary to enter upon the land of the Plaintiffs' railway. *A fortiori*, supposing there were a double line, an up and a down line of the Defendants, one of the lines of the Defendants, in order to join with and cross the further line of the Plaintiffs, before it could get to that line must cross the line of the Plaintiffs nearest to it, and that would of necessity require that there should be a right in the Defendants to *enter upon* the line of the Plaintiffs. It would therefore be absolutely impossible for the Defendants to effect the junction which they are expressly authorized to make, unless they could enter upon the lands of the Plaintiffs, and I consider the saving clause at the end of the 29th section to apply to both branches of the section, and that that section is to be read thus: That it shall not be lawful for the company to enter upon, take, &c., &c., save only for the purpose of effecting the junction; nor lawful to enter, vary, or interfere, &c., save only for the

purpose of effecting the junction. Now does that give the Defendants a right to *purchase and take* the lands? I do not think that it does. The lands which the Defendants desire to take is a portion over which the Plaintiffs' line of railway will run, if it does not actually do so, and over which, as I collect, it does run; and I cannot consider it possible to construe the Act as intended to give power to take as owners, a portion of the land belonging to the pre-existing railway.

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I think the construction is this: If it is necessary for you the Defendants, for the construction of your railway, and for the purpose of effecting a junction, to purchase the Plaintiffs' lands, then it gives powers for that purpose; but that assumes that you cannot effect the junction without purchasing. But there is no ground for assuming that you cannot effect the junction without purchasing. You may purchase land up to the point at which you are about to make your junction, and then without purchasing the Plaintiffs' land, you may have a right of easement over the Plaintiffs' line so as to effect the junction.

My opinion is, that upon the true construction of the 23rd and 29th sections, the Defendants have no right to take from the Plaintiffs and occupy as owners, any of the land in controversy; that is, of the land over which the Plaintiffs' line runs. The question where the junction is to be made, I do not intend to decide. What I think I ought to do is, to restrain the Defendants from continuing in or keeping possession of the land situate at *Dudley* in the Plaintiffs' bill mentioned, in the terms of the first branch of the notice of motion; but without prejudice to the question at what point or in what way the junction of the Defendants' railway with the Plaintiffs' is to be effected, and without prejudice to such right as the

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Defendants may have to enter upon the land in controversy, for the purpose of effecting the junction. This will negative the Defendants' right to take possession as owners, but will leave undetermined and untouched the question where and how the junction is to be made; and the question of the Defendants' right to enter on the land for the purpose of their junction.*

* The clauses of the Act and the arguments relating to the right of selecting the point of junction are retained, although the point was not decided, the Reporter being informed that further proceedings are commenced in which those matters will be of importance.

1852:
20th February,
and 4th March.
Will.
Construction.

IN THE MATTER OF THE BUCKINGHAMSHIRE RAILWAY COMPANY AND THE LANDS CLAUSES CONSOLIDATION ACT, AND IN THE MATTER OF TOOKEY'S TRUST.

EX PARTE HOOPER AND WIFE.

Devise to *A.* for life; remainder to all and every the children of her body, their heirs and assigns, as tenants in common; but in case *A.* should die without leaving any issue of her body, then over. *A.* had two children, both of whom died before her; one died leaving a child who survived *A.*; the other died without issue. Held that the word *leaving* meant *having*, and that the two children of *A.* took vested interests as tenants in common in fee.

THIS was a petition by the Rev. *John Hooper* and *Frances* his wife, praying the payment to the said *J. Hooper* absolutely in right of his wife, of a moiety of a sum of money paid into Court by the *Buckinghamshire Railway Company*, for the purchase of certain lands, and the payment of the other moiety to the said *J. Hooper* and the trustees of the will of *Henrietta Tookey*, formerly *Henrietta Prentice*. The right to these monies

Kennedy & Sedgwick J. K & J. 540

depended upon the construction of the will of *Thomas Prentice*, the father of *Henrietta Tookey*. The will of *Thomas Prentice*, so far as it regarded the devise to *Henrietta Tookey*, was as follows :—

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“ Also I give and devise unto my daughter *Henrietta Prentice* all that my copyhold messuages, tenements, or farm-house, situate and being in the parish of *Little Horwood*, in the county of *Bucks*, and also all those my several inclosed pieces or parcels of arable, meadow, and pasture ground, to the said messuage, tenement, or farm-house belonging, and therewith occupied, now in the tenure or occupation of *John Willmer*, containing together, by admeasurement, forty acres, with their and every of their rights, members, and appurtenances, to hold the same unto and to the use of my said daughter *Henrietta Prentice* and her assigns, for and during the term of her natural life; and from and immediately after her decease, I give and devise the said messuage, tenement, or farm-house, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their rights, members, and appurtenances, unto and to the use of all and every the children of the body of my daughter *Henrietta Prentice*, lawfully begotten, (in case she shall leave more than one child,) their heirs and assigns for ever, as tenants in common, and not as joint tenants. But in case my said daughter *Henrietta Prentice* shall have only one child of her body, lawfully begotten, then I give and devise the said messuage, tenement, or farm-house, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their appurtenances, unto and to the use of such one child, his or her heirs and assigns for ever. *But in case my said daughter Henrietta Prentice shall happen to die without leaving any issue of her body, lawfully begotten, then I give and devise the said messuage, tenement, or*

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farm-house, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their appurtenances, unto and to the use of all and every such child or children of my body, lawfully begotten, as I shall leave, or have living at the time of the decease of my said daughter *Henrietta Prentice*, and to their heirs and assigns for ever, as tenants in common (a)."

Henrietta Prentice married *Tookey*, and had two children, *John* and *Henrietta*, both of whom died before her. *John* married, and by his will devised his interest in the property in question to his widow, who afterwards married the Petitioner *Hooper*; and he died before his mother leaving a child, *J. J. Tookey*, who survived. *Henrietta*, the younger, died without issue, and, by her will, devised to her mother, among other things, her interest in the property purchased by the railway company. *Henrietta Tookey* the elder, by her will, gave certain property, including the property devised to her by her daughter *Henrietta*, to the Petitioner *J. Hooper* and *W. B. Eagles*, upon trust. On the purchase of the land, part of the copyhold property devised by the will of *Thomas Prentice*, by the company, there being a doubt whether the two children of *Henrietta Tookey* took vested interests in it, the company paid the purchase-money, 680*l.*, into Court, and this petition was now presented by the Rev. *J. Hooper* and his wife, claiming a moiety for Mr. *Hooper*, in right of his wife, under the devise to her by her former husband, and the other moiety for himself and *Eagle* as trustees of the will of *Henrietta Tookey*, the widow.

Mr. *Toller*, for the Petitioners, contended that the

(a) There were two other devises in the will, which are not set out, as all that is material in them is noticed in the judgment.

children of *H. Prentice* took immediately on their births vested remainders in fee expectant on the decease of their mother; the words, "without leaving any issue," in the latter part of the devise, meaning, "without having any issue." He cited *Sturgess v. Pearson* (a), and *Maitland v. Chalie* (b).

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Mr. *Dickenson*, for the grandson, *J. J. Tookey*, contended that *H. Prentice* took an estate tail. He cited *Doe d. Simpson v. Ewart* (c), *Doe d. Cadogan v. Ewart* (d).

Mr. *Speed*, for the railway company, said the company ought not to pay any costs. The payment into Court and this application being the result of adverse litigation between the Petitioners and the Respondent *J. Tookey*. He referred to the 80th section of the Lands Clauses Consolidation Act.

The VICE-CHANCELLOR:

March 4.

The order to be made on this petition depends on the construction of the will of *Thomas Prentice*, by which the testator devised certain copyhold property; and the question is, whether the two children of *Henrietta Prentice*, afterwards *Henrietta Tookey*, took under that will vested interests. [The Vice-Chancellor referred to the devise to *H. Prentice*, set out ante, pp. 265, 266, and then proceeded] :— The will contains two devises of other portions of real estate, one for the benefit of *Mary Anne Prentice* and her children; the other for the benefit of *Thomas Eagle Prentice* and his children. The three devises are in the same language, except as to one word in one of them, and that word, although not conclusive, is not without significance. The first devise is to *Hen-*

(a) 4 Mad. 411.

(c) 4 Bing. N. S. 333.

(b) 8 Mad. 243.

(d) 7 Ad. & El. 636.

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rietta Prentice. It begins by a devise to *Henrietta Prentice* for life, "and from and after her decease unto and to the use of all and every the children of the body of my daughter *Henrietta Prentice* lawfully begotten, in case she shall leave more than one child, their heirs and assigns for ever, as tenants in common, and not as joint tenants." If the language stopped there, it is clear that every child would take a vested interest. The words that follow are: "But in case my said daughter *Henrietta Prentice* shall leave only one child of her body lawfully begotten, then I give and devise the said messuage, &c., unto and to the use of such one child, his or her heirs and assigns for ever." Passing to the limitation over, there can be no doubt that when the testator used the words, "But in case my said daughter *Henrietta Prentice* shall happen to die without leaving any issue, &c. of her body lawfully begotten, then I give and devise, &c. unto and to the use of all and every such child or children of my body lawfully begotten, as I shall leave or have living at the time of the decease of my said daughter *H. Prentice*, and to their heirs and assigns for ever, as tenants in common." He means by the words, "without leaving issue," without leaving issue at her death; and on the true construction of the devise over on her dying without leaving issue, the devise to such other children of the testator, means in case the daughter should die without leaving issue living at her death; and the limitation over, there being a grandchild, cannot take effect.

Now what is the effect of the first series of limitations? The events that have happened are, that *Henrietta Prentice* had two children, both of whom predeceased her, but one left a child who survived *Henrietta Prentice*. I think that, in this case, the testator uses the word *leave* in the sense of *have*. That meaning has

been applied to the word *leave* in many cases. The testator did not mean to make it a condition of the devise that the children of *Henrietta Prentice* should survive her. The words are, "to the use of all and every the children of the body of my daughter;" but in case she shall die without leaving any, then over. These words do not refer to *Henrietta Prentice leaving*, but to her *having* children. If that were not the construction, the testator would have died intestate, since there is no gift to the grandchild, and the gift over to the other children of the testator cannot take effect. That consideration is not conclusive, but it helps the construction. It is to be noticed also that there are two other devises in the will, one for *Mary Anne* and her children, another for a son and his children. And these two devises are precisely in the same language, with this single exception, that in the devise to the son, in the limitation after his death, the words are not in case of his *leaving*, but of his *having* more than one child; and with that exception the devises are exactly in the same language. That change in the language, though no doubt in fact inadvertent, may be used to show the meaning of the testator when he is imposing an apparent condition. I think, on these grounds, that the two children of *Henrietta Prentice* took vested interests as tenants in common in fee; each of them it appears made a will. The order, therefore, must be made in accordance with those devises.

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The counsel for the company not being present, the Court decided they must pay the costs, subject to anything their counsel might have afterwards to submit on that point. It was afterwards found that the usual order in such matters provided for the exception referred to in the 80th section of the Lands Clauses Consolidation Act, and the order was made accordingly.

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5th and 6th
November and
9th December.*Heriots.**Relief.**Custom.**Pleading.**Demurrer.*

A bill was filed, alleging that, by the custom of the manor, money payments were, and had from time immemorial been, due and payable in lieu of heriots and reliefs; that the Plaintiffs were entitled to distrain; and that, by reason of confusion of boundaries, they could not distrain; but no custom of distraining was in express terms alleged. Held, on demurrer, that the bill could not be sustained; that where money payment is due in lieu of heriots and relief by the custom, there must be also a custom of distress, and the custom must be alleged positively, and not merely by inference.

MAYOR OF BASINGSTOKE v. LORD BOLTON.

THIS case came on upon demurrer for want of equity and want of parties. The material allegations of the bill were as follow :—That the Plaintiffs are a corporation aggregate, and have a common or corporate seal. That they are, and for very many years last past have been, lords of the manor of *Basingstoke Common, Southampton*. That there are divers freehold lands and tenements situate in the parish of *Basingstoke*, in the said county of *Southampton*, which are, and from time immemorial have been, situate within and holden of the said manor of *Basingstoke*, in respect of which lands and tenements, by the custom of the said manor, certain ancient yearly quit rents from time immemorial have been due and payable by the tenants thereof to the lords of the said manor for the time being, in respect of such lands and tenements; that by the custom of the said manor certain money compositions or commutations, in the lieu or place of heriots, are, and from time immemorial have been, due and payable upon the deaths of the respective tenants of such lands and tenements to the lords of the said manor for the time being; and in respect of such lands and tenements by the *custom of the said manor* certain money compositions or commutations, in the lieu or place of reliefs, are, and from time immemorial have been, due and payable by the respective tenants of such lands and tenements upon their succeeding to such lands and tenements, by descent or

purchase, to the lords of the said manor for the time being. That at the date of the award after mentioned, *Harry*, the then Duke of *Bolton*, was tenant to the Plaintiffs as lords of the said manor of *Basingstoke*, of thirty-eight different and distinct estates, comprising freehold lands and tenements situated in said parish of *Basingstoke*, which were, and had been from time immemorial, situated within and holden of said manor of *Basingstoke*; and in respect of which estates, from time immemorial, certain ancient yearly quit rents were, and from time immemorial had been, due and payable to the lords of said manor for the time being; and in respect of which estates, from time immemorial, certain money compositions or commutations, in the lieu or place of heriots, were, and from time immemorial had been, due and payable upon the deaths of the respective tenants of such estates to the lords of said manor for the time being; and in respect of which estates, from time immemorial, certain money compositions or commutations, in the lieu or place of reliefs, were, and from time immemorial had been, due and payable upon the succession of the respective tenants of such estates, by descent or purchase, to the lords of said manor for the time being; and such ancient yearly quit rents, in respect of the said thirty-eight estates, amounted to the yearly sum of 18*l.* 15*s.* 4*d.*, and were, at the date of said award, payable in each and every year to Plaintiffs as lords of said manor, by said *Harry*, Duke of *Bolton*, and such money compositions or commutations, in lieu or place of heriots, in respect of said thirty-eight estates amounted to the sum of 100*l.*, and such sum was, at the date of said award, payable to Plaintiffs as lords of the said manor, upon the death of said *Harry*, Duke of *Bolton*; and such money compositions or commutations, in the lieu or place of reliefs, in respect of the same

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estates, amounted to the sum of 22l. 18s., and such sum was, at the date of the said award, payable to Plaintiffs as lords of said manor, by the tenant who should, upon the death of said *Harry*, Duke of *Bolton*, succeed to the said thirty-eight estates by descent or purchase. That, by an Act of Parliament passed in the 26th year of the reign of his late Majesty, King George the Third, intituled "An Act for dividing and-inclosing the open and common Fields, common Downs, common Pastures, common Meadows, waste Lands and other commonable Parishes within the Parish of *Basingstoke*, in the county of *Southampton*;" after reciting, as the fact was, that Plaintiffs were lords of the manor of *Basingstoke*, and as such entitled as therein mentioned, certain persons therein named were appointed commissioners for setting out, dividing and allotting the open and common fields, common downs, common pastures, common meadows, waste lands, and other commonable places within the said parish of *Basingstoke*, amongst the several proprietors and persons interested therein, and for putting the said Act into execution, subject to the rules, orders, and directions in and by the said Act established and appointed. And it was by the said Act, amongst other things, enacted that said commissioners should set out, divide, assign, allot and award all the residue and remainder of said open and common fields, common downs, common pastures, common meadows, waste lands, and other commonable places, so intended to be divided, allotted, and inclosed as aforesaid, after making certain allotments as therein mentioned, unto and amongst the several persons who, at the time of making such division and allotment as aforesaid, should be entitled to and interested in the same, in proportion to their respective shares, rights, and proportions therein, other than and except the several persons to

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whom allotments were therein before directed to be made in respect to the rights, properties, and interest to be compensated for by such allotments, and in lieu of their respective shares, rights, properties, and interest therein, and for the more convenient situation and disposition of the several farms, lands, and estates within the said parish. It was further enacted, that it should and might be lawful to and for all or any of the owners or proprietors of any messuages, buildings, lands, tenements, or hereditaments, new allotments, or old inclosures within the said parish, being tenants in tail or for life, or by a copy of court roll, or for a term of years at a small rent, and also for the husbands, guardians, trustees, committees, or attorneys acting for and on behalf of any such owners or proprietors, who were under coverture, minors, lunatics, or beyond the seas, or under any other legal disability, to exchange all or any of their said messuages, buildings, lands, tenements, or hereditaments, new allotments, or old inclosures within the same parish, or within any adjoining parish, township or place, so as all such exchanges should be made by and with the consent and approbation of the said commissioners as therein mentioned, and that all such exchanges so to be made should be good, valid, and effectual in law to all intents and purposes whatsoever, notwithstanding the interests of the persons exchanging in the lands or estates to be respectively exchanged as aforesaid, might be of a nature different from each other, and notwithstanding the want of sufficient title in the exchanging parties, or any will, settlement, or limitation affecting the premises so to be exchanged. And it was further enacted, that as soon as conveniently might be after the said commissioners should have completed and finished the allotments and exchanges of the said open and common fields, common downs, common

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pastures, common meadows, waste lands, and other commonable places thereby directed and intended to be divided, allotted, or exchanged as aforesaid, pursuant to the purport and directions of the now stating Act, they should form and draw up or cause to be formed and drawn up such an award or instrument in writing as therein mentioned, and which said award or instrument should be fairly engrossed or written on parchment, and signed, and sealed, and enrolled as therein mentioned. And it was by the now stating Act further enacted, that nothing in the now stating Act should prejudice, lessen, or defeat the benefit, right, title, or interest of the lord or lords of the manor or manors, seigniories or royalties wherein the said common fields, common downs, common pastures, common meadows, and waste lands, and other commonable places thereby directed to be divided and inclosed, or any part thereof, were or was lying and being, other than such rights of soil and common rights as were intended to be barred or extinguished by the now stating Act; but such lord or lords for the time being should and might from time to time, and at all times thereafter, hold and enjoy all rents, services, courts, perquisites of courts, and all other privileges to the said manor or manors belonging or appertaining as fully and effectually as if the now stating Act had not been made. That by an award according to the provisions of the said Act, and duly signed, sealed, and enrolled as thereby required, and bearing date on or about the 17th of September 1788, the said commissioners allotted divers plots or parcels of the said common lands to the said *Harry, Duke of Bolton*, and his lessees, in respect of which the said *Harry, Duke of Bolton*, was the tenant as aforesaid, according to the respective rights and interests of the said *Harry, Duke of Bolton*, and his lessees in such

estates respectively. That some of the plots or parcels of land so allotted to said *Harry*, Duke of *Bolton*, and his lessees as aforesaid, were under the power in that behalf contained in said Act of Parliament, exchanged for divers other plots or parcels of land situate in said parish of *Basingstoke*, and within and holden of said manor. That by an instrument in writing, under the hands and seals of the commissioners for the execution of the said Act of Parliament aforesaid, and bearing date the 18th of September 1788, and intituled as follows, that is to say "A Schedule of Lands in the Township and Parish of *Basingstoke*," &c., which are subject to the payment of quit-rents and heriots to the corporation of *Basingstoke* as lords of the manor, allotted or exchanged by virtue of an Act of Parliament passed in the 26th year of the reign of his present Majesty King George the Third, intituled "An Act for dividing, allotting, and inclosing the open and common Fields, common Downs, common Pastures, common Meadows, Waste Lands, and other commonable places within the Parish of *Basingstoke*, in the County of *Southampton*;" which lands so allotted or exchanged are hereby respectively declared, shall be subject to the same quit-rents and heriots as the other lands were subject and liable to, it appears that the said *Harry*, Duke of *Bolton*, was then the owner of thirty-eight estates situated within and holden of said manor of *Basingstoke*, for which divers yearly quit-rents, amounting together to the sum of 18*l.* 15*s.* 4*d.*, were due and payable, and had been constantly paid to Plaintiffs as lords of said manor of *Basingstoke*, by the respective tenants for the time being of said thirty-eight estates, and for which estates a money composition, or commutation of 100*l.* was due and payable, and had been constantly paid to Plaintiffs as lords of said manor, for or in lieu of *heriots*,

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upon the deaths of the respective tenants for the time being of said thirty-eight estates; and for which estates money compositions, or commutations, amounting together to the sum of 22l. 18s. were due and payable, and had been constantly paid to Plaintiffs as lords of said manor of *Basingstoke*, for or in lieu of reliefs by the tenants succeeding to the said estates by descent or purchase. That said *Harry*, Duke of *Bolton*, was, from the date of said award up to and at the time of his death, tenant to Plaintiffs as lords of said manor of *Basingstoke*, of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof, under said award as aforesaid, and that he departed this life some time in 1792. That upon the decease of the said *Harry*, Duke of *Bolton*, said thirty-eight acres, together with the lands so allotted or exchanged in respect thereof as aforesaid, became vested, either by descent or purchase, in *Jane Maria Browne*, who intermarried with *Thomas Orde*, Esq., who was afterwards created Baron *Bolton*, and died before his said wife, and that said *Jane Maria*, Lady *Bolton*, was at her death tenant to Plaintiffs as lords of said manor of *Basingstoke*, of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof under said award as aforesaid, and that said *Jane Maria*, Lady *Bolton*, departed this life in 1815. That upon the decease of said *Jane Maria*, Lady *Bolton*, the said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof as aforesaid, became either by descent or purchase vested in *William Powlett*, Lord *Bolton*, and that said *William Powlett*, Lord *Bolton*, was at his death tenant to Plaintiffs as lords of said manor of *Basingstoke*, of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof, under said award as aforesaid; and that said *William Powlett*, Lord *Bolton*,

departed this life on or about the 13th of July 1850. That upon the decease of said *William Powlett*, Lord *Bolton*, said thirty-eight estates, together with the lands so allotted or exchanged as aforesaid, became either by descent or purchase, and same are now vested in *William Henry Orde Powlett*, the present Baron *Bolton*, the Defendant hereto. That upon the decease of said *William Powlett*, Lord *Bolton*, said Defendant, either as heir or as a purchaser, entered into the possession or the perception and receipt of the rents and profits of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof as aforesaid, under said award, and he hath ever since been and is now in such possession, or perception and receipt as aforesaid, as tenant to Plaintiffs as lords of the said manor. That during the respective tenancies as aforesaid of said *Harry*, Duke of *Bolton*, *Jane Maria*, Lady *Bolton*, and *William Powlett*, Lord *Bolton*, said yearly quit-rents, amounting to 18l. 15s. 4d., were duly paid by them respectively to Plaintiffs as lords of the said manor of Basingstoke; and that since the death of said *William Powlett*, Lord *Bolton*, said Defendant had duly paid said sum of 18l. 15s. 4d., the amount of said yearly quit-rents, to Plaintiffs, as lords of the said manor. That, upon the respective deaths of said *Harry*, Duke of *Bolton*, and of the said *Jane Maria*, Lady *Bolton*, the respective sums of 100l. for money compositions, or commutations for heriot due and payable on the respective deaths of said *Harry*, Duke of *Bolton*, and *Jane Maria*, Lady *Bolton*, as tenants respectively of said thirty-eight estates, together with the lands allotted or exchanged in respect thereof under said award as aforesaid, were duly paid to Plaintiffs as lords of said manor of Basingstoke, by said *Jane Maria*, Lady *Bolton*, and *William Powlett*, Lord *Bol-*

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ton respectively, as the tenants who succeeded respectively to said estates, upon the respective deaths of said *Harry*, Duke of *Bolton*, and *Jane Maria*, Lady *Bolton*, as aforesaid. That, upon the respective deaths of said *Harry*, Duke of *Bolton*, and of *Jane Maria*, Lady *Bolton*, the respective sums of 22*l.* 18*s.*, the amount of money compositions, or commutations for reliefs in respect of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof under said award as aforesaid, were duly paid to Plaintiffs as lords of said manor of *Basingstoke*, by said *Jane Maria*, Lady *Bolton*, and *William Powlett*, Lord *Bolton*, respectively as tenants succeeding to said estates as aforesaid, upon the respective deaths of said *Harry*, Duke of *Bolton*, and *Jane Maria*, Lady *Bolton*. That, upon the death of said *William Powlett*, Lord *Bolton*, as aforesaid, Plaintiffs, as lords of said manor of *Basingstoke*, became entitled to receive from and be paid by said Defendant, as the tenant succeeding to said estates, the sum of 100*l.*, being the amount of money compositions, or commutations for heriots in respect of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof under said award as aforesaid, which became vested as aforesaid in said Defendant; and that, upon the death of said *William Powlett*, Lord *Bolton*, as aforesaid, Plaintiffs as lords of said manor also became entitled to receive from and be paid by said Defendant, as succeeding to said estates, the sum of 22*l.* 18*s.*, being the amount of money compositions, or commutations for reliefs in respect of said thirty-eight estates, together with the lands so allotted or exchanged in respect thereof, under said award as aforesaid, which became vested as aforesaid in the said Defendant, or in case of nonpayment of said sums of 100*l.* and 22*l.* 18*s.* respectively, to distrain upon said thirty-eight estates, and the lands so

allotted or exchanged in respect thereof, under the said award, and to levy and raise, by competent distress, said respective sums of 100*l.* and 22*l.* 18*s.* That neither said award under said Act of Parliament or said schedule thereto, stated or specified the precise or particular lands or tenements comprising the said thirty-eight estates in respect of which the said allotments were made; and that Plaintiffs cannot describe or state the particulars of which the said thirty-eight estates consisted, or the metes or bounds thereof; *and that the said estates, and the metes and bounds thereof, are mixed up and confounded with other estates of said Defendants*; nor can Plaintiffs state or set forth in respect of what particular hereditaments or premises the said yearly sum of 18*l.* 15*s.* 4*d.* for quit-rents is paid, or what was the particular heriot or relief in lieu or place of which such money compensations, or commutations as aforesaid were respectively paid, or in respect of what precise lands or tenements the same compositions or commutations are respectively payable, or what proportions of the said compositions or commutations of 100*l.* and 22*l.* 18*s.* are respectively payable in respect of each of said thirty-eight estates, together with the lands allotted or exchanged in respect thereof as aforesaid; *and the boundaries of said thirty-eight estates and allotted or exchanged lands as aforesaid cannot be ascertained by Plaintiffs, and are mixed up and confused*; and that by reason thereof Plaintiffs cannot with safety distress upon said estates or said allotted or exchanged lands or any part thereof, or take or prosecute any proceedings at law for the recovery of the said sums of 100*l.* and 22*l.* 18*s.* or either of them, without the aid and assistance of this Court. Then followed a charge that the Defendant ought to set forth the metes and bounds, &c. Charge, that said Defendant sometimes pretends that

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the party who has the first estate of inheritance in the said thirty-eight estates, and of the allotments and exchanges in respect thereof under said award, is a necessary party to this suit, but it is not known to Plaintiff who such party (if not said Defendant) is. And there was then the usual charge of books and papers; and a charge, that said sum of 100*l.*, the amount of said money compositions, or commutations for heriots aforesaid, and the said sum of 22*l.* 18*s.*, the amount of said money compositions, or commutations for reliefs aforesaid, in respect of the said thirty-eight estates aforesaid, became in the years 1700, 1722, and 1754, payable to Plaintiffs as lords of said manor of *Basingstoke*, and were in such years duly paid to Plaintiffs as such lords as aforesaid by the respective persons then liable to pay the same sums respectively.

The prayer was as follows:—That it may be declared by this Court, that Plaintiffs, upon the death of said *William Powlett*, Lord *Bolton*, became and now are entitled to the said sums of 100*l.* and 22*l.* 18*s.* respectively, in the lieu or place of heriots and reliefs in respect of the said thirty-eight estates, and the lands allotted or exchanged in respect thereof under the said award as aforesaid. And that the right and title of Plaintiffs to the said sums of 100*l.* and 22*l.* 18*s.* respectively may be established; and that Plaintiffs may be paid the said sums of 100*l.* and 22*l.* 18*s.* respectively by the said Defendant; or otherwise, that all impediments to Plaintiffs' recovery of the said sums of 100*l.* and 22*l.* 18*s.* respectively, at law, may be removed; and that the precise lands, tenements, hereditaments, and premises comprising the said thirty-eight estates, and the said allotments and exchanges in respect thereof, under the said award, may be ascertained, and the proper metes and bounds thereof

fixed and determined ; and that Plaintiffs may proceed at law, under the directions of this Court, to establish their right and title to said sums of 100*l.* and 22*l.* 18*s.* respectively, and may, if successful at law, be quieted by this Court in the perception and enjoyment of the said sums for the future.

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Mr. *Craig*, for the Defendant.

Our case is, that the Plaintiff can only have discovery. The bill assumes that the sums claimed are recoverable by distress, and by distress only ; they are recoverable by action, and to ascertain the metes and bounds is not essential for that purpose ; for recovering the *heriot*, an action is the proper course. The practice is, the heriot is seised *pro formâ*, and then an action of trover is brought for it. Here the principal demand is for *heriot*, and 100*l.* is the sum sought to be recovered. The heriot is demandable from the assets of the deceased tenant—the *relief* only from the incoming tenant. As to the heriots, therefore, there is, first, no right of suit against Lord *Bolton* ; if there is any relief for payment of the heriots, it must be against the executors of the deceased Lord *Bolton*, who are not parties. [He cited 2 Black. Com. 97, as to the definition of heriots ; and see 3 Black. 15, as to the remedy for heriots.] A heriot, therefore, is no charge upon the land, but is due from the estate of the deceased tenant. The allegations of the bill are, that the payment is a heriot *custom*, not a heriot *service* ; and there is a great distinction between them. [He referred to 2 Watk. Copy., Coventry's edit. 128, as to the distinction between *heriot service* and *heriot custom*.] Now, as to the heriots the case stands thus : In no case is a heriot a charge on the land in the hands of the incoming tenant, whether he is tenant by descent or by purchase. There is no remedy for heriot *custom*, except

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by seizure; if, then, there be a composition of heriots by custom, it must be paid out of the estate of the deceased tenant. If there is a money payment due, it is due in respect of the chattels of the deceased tenant, and there can be no right against the succeeding tenant (the Defendant). Therefore, if there is an equity, the bill must be amended by adding parties.

Next, as to the equitable relief claimed in respect of the composition for *relief*. The relief was a sum payable, analogous to a fine on taking up copyhold, and it must be capable of being recovered by an action. As to this, the equity is founded on the alleged impossibility of distraining, on account of ignorance of the metes and bounds. There is no relief, therefore, unless distress is the only remedy. Now a *relief*, if due by *custom*, is not recoverable by *distress*, unless there is also a *custom of distress*, and that is not alleged by the bill. But assume that the relief is recoverable by distress only, then the Plaintiff has no right to relief, but only to discovery; and if he is not entitled to relief, he cannot have discovery except by a *bill of discovery merely*. The result of the allegations of the bill is, that there is no allegation of confusion of boundaries *by the default of the Defendant*, and unless that is the case, there can be no bill for ascertaining boundaries; *Wake v. Conyers* (a). In that case Lord Keeper said, "This Court has no power to fix the boundaries of legal estate, unless where an equity is superinduced by the act of the parties, or some particular circumstance of fraud." In *Speer v. Crawler* (b), the Master of the Rolls refers to *Wake v. Conyers*, and approves of it, adding, that the circumstance of confusion of boundaries furnishes *per se* no ground for the inter-

(a) 1 Eden, 331.

(b) 2 Mer. 410, 414.

position of the Court. Then, if no relief can be obtained, the Court will not allow a bill for relief to be amended to convert it into a bill of discovery, *Cholmy v. Clinton* (a).

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With him Mr. *Wickens*.

The bill asks two sorts of relief: first, payment of certain sums of money; and if that is not granted, then equitable relief in respect of confusion of boundaries. As to the latter point, *Wake v. Conyers* has been approved in *Marquis of Bute v. Glamorganshire Canal Company* (b). [He referred to the passage in *Wake v. Conyers*, "All the cases where the Court has entertained bills for establishing boundaries have been where the soil itself was in question, or where there might have been a multiplicity of suits."] Now there is no allegation here of any question as to the right to the soil: it is admitted to be all Lord *Bolton's*. The result of the allegations of the bill is, that the confusion has arisen from the Inclosure Act. Assuming, then, that there is no right on that ground, the bill is in effect an equitable *action* for the recovery of two sums of money by the lord against the tenant. Then, is the title alleged with that ordinary accuracy which would enable the Defendant to know what he is to meet? The allegation of the bill is of payment by custom, by way of commutation. The *sum* to be paid must then be payable by the person by whom the *service* was to be rendered; now the heriot was the chattel of the deceased tenant, without reference to either the land of the tenant, or even the manor; for the lord might take it wherever he could find it, but as the personal estate of the tenant. On the statements of the bill, the allegation is of a *custom*, and not of a *grant*. Whenever a heriot is

(a) 2 Ves. & B. 113.

(b) 1 Phil. 681; see p. 684.

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payable on the death of the tenant for life, it must be *heriot custom*. [He referred to Kitchin's Jurisdictions, 267; 1 Scriven on Copyholds, p. 375, and the authorities there cited.] If that is law, then the bill is against the wrong person; and the only equity is the difficulty of ascertaining the land, which is of no consequence, as the lord is not confined to any particular land. If the Plaintiff, therefore, has any right, it is against the late lord's estate, and quite independent of the question out of what land it issued. At any rate, no such claim can be maintained in the absence of the representatives of the late lord. If there were a *custom* to take first from the *terre-tenant*, he must have a right over against the estate of the deceased tenant; and therefore, if for no other reason, the representative of the deceased tenant ought to be present. The bill is therefore clearly defective for want of parties.

Next, as to the claim for a *relief*. The question is, is there any equity? If there be a *relief*, it must be admitted that it is payable by Lord *Bolton*; but how is it recoverable? Does the necessity of discovery give a right to relief as well? That is not now the law of Court, but if that were so, they must show that distress is the only remedy; if there is any other remedy, the equity fails. [As to customary relief, he cited Coke's Complete Copyholder, the 31st section, on Accid. Serv. p. 45, to show that an action of debt may be brought.] There must be a *custom* of distress to enable the lord to distress (*a*).

Mr. *Campbell*, for the bill.

Although in the bill, quit-rents, heriots, and reliefs are spoken of, the bill seeks relief merely as to the two

(a) 1 Scriv. Copyhold, 375.

latter. As to the award, we need not show that it was authorized ; we use it only to show a fact ; viz. the title of Lord *Bolton*. (He read the allegations of the bill, pp. 277, 278, showing payments of heriots and relief by the *terre-tenants as such*, to show that a custom is alleged by the bill, of the liability of the incoming tenant to pay them.) The equity is founded on this : that neither the award nor schedule annexed to it specified the particular lands comprising the thirty-eight estates, and the *Plaintiff cannot describe the metes and bounds*. As to the heriots, there are two kinds of heriots. First, *heriot service*, for which the lord may seize or may distrain on the lands in respect of which they are due ; secondly, *heriot custom*, and for that he may seize : it is said he may not distrain, but that is not the law. We say, first, the heriot here was a heriot *service*, therefore there is a right of distress ; secondly, the rent or sum due by commutation in place of it was a *rent service*, and therefore there is a right of distress. That a sum reserved in lieu of heriot *service* is a *rent*, is clear : *Lanyon v. Carne* (a) ; he cited also 2 Rolle's Abridgment, 451, P. Here there was a heriot payable before the time of Rich. I. There is a *custom* from the time of Rich. I., for commuting it into a money payment. This was not originally a *heriot* by custom, but the commutation is by custom. (He cited Gilbert on Rents, page 9 ; 4 Geo. II. c. 28, s. 5, which puts all rents on the same footing as to the right of distress.) Now it cannot be denied that these payments are rents ; and whether they are rents *service* or not, there is by the statute, a right of distress. Besides, the bill states that the payments are due and payable by the tenants who succeeded to the possession of the estates, and that the Plaintiffs are enti-

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(a) 2 Saund. 165.

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tled to them, and *to distrain*; and the demurrer admits these allegations to be true. The Plaintiffs would in point of law have therefore a right of distress, but they are deprived of the power of exercising it, because they cannot describe the lands in respect of which the distress is leviable. The sums due are not an aggregate, but thirty-eight sums in respect of thirty-eight estates, one on each estate; and we must levy the distress for each, on each parcel of land out of which it is due. We do not know how much of the 100*l.* is due for each particular estate. We cannot therefore use our legal remedy, and therefore equity will relieve: see Mitford, pp. 134 *et seq.* As to the *reliefs*, they are of common right, and they are recoverable by distress. Even if there were no original right, but it was altogether *custom*, still if there is a *custom* in rent, there is also a *custom* of distress: *Hungerford v. Haviland* (a). As to the case of *Wake v. Conyers*, cited in respect of the equity arising out of the confusion of boundaries, that consists merely of dicta. The bill there, was not a bill to ascertain boundaries at all. (He cited also 1 Chanc. Cas. 120; *Davy v. Davy* (b), *Harding v. Countess of Suffolk* (c), *Cocks v. Foley* (d), *Duke of Leeds v. Powell* (e), *Duke of Leeds v. Strafford* (f), *Holder v. Chambury* (g), *Godfrey v. Littell* (h).) On the question of defect of parties, if the payments should be made as is alleged and admitted by the demurrer, by the terre-tenant, it cannot be necessary to have the executors of the deceased tenant. If that ground of demurrer were good, it would

(a) Sir W. Jones' Rep. 132.

(b) Chanc. Cas. 144.

(c) 1 Rep. in Chanc. 33.

(d) 1 Vern. 359.

(e) 1 Ves. 172.

(f) 4 Ves. 180.

(g) 3 P. Wms. 256.

(h) 2 Russ. & M. 630.

at any rate only apply to the *heriots*, and therefore it is no ground of general demurrer for want of parties.

Mr. *H. Clarke*, with him.

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The prayer of the bill is, that the right to the composition may be established ; it also asks the removal, if necessary, in order to go to law, of the impediments which would prevent a fair trial. Whether, therefore, the right ought to be enforced at law or not, there is a prayer invoking an equity to put the Defendant on terms in proceeding at law. Now the case made by the bill is, that there is a *heriot service* before the time of legal memory ; then, that from time immemorial there was a *custom* to compound ; that custom extends over thirty-eight estates, and we cannot say on which any particular portion is to be levied. In this case seizure is, of course, impossible ; we cannot distrain because of the confusion.

[The *Vice-Chancellor* :—If the Defendant can inform you that out of estate A. so much is payable, out of estate B. so much, &c., discovery is all that is wanted. If he cannot tell you, what decree can help you to ascertain boundaries ?]

We should still then be obliged to make thirty-eight distresses, &c. ; the Court would prevent that, for preventing multiplicity of actions. If any relief can be granted, the demurrer, which is general, must be overruled. If we could have an *action* at all, how are we to frame an action to recover the gross sum ? All we could do would be to bring an action for each aliquot part, and then there is the same difficulty, that we do not know

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what are the specific payments due for each part. But whether an action would lie is very doubtful ; no case has been cited to show that it will. (As to heriots and the mode of recovering them, he cited Bradley on Distress, p. 144, *et seq.*)

Mr. Craig, in reply.

In this case, as to the reliefs, they must be relief *custom* ; for relief *service* is only payable on death, but relief custom is on death or alienation, and then it is recoverable on death : Coke's Copyholder, s. 25. And here the allegation is, that it is payable on *death or alienation*. It is therefore *relief custom*, as to which there is no distress. It is immaterial to the Plaintiff what are the metes and bounds, since he cannot distrain. The case in Rolle's Abridgment, 451, turned on the construction of the particular lease. As to there being thirty-eight estates, and therefore thirty-eight payments in respect of the heriots, and so in respect of the reliefs, that is not the allegation of the bill. (He referred to the passages in pp. 271, 272, as to the custom of the manor.) But if it were so, still they must have ascertained the thirty-eight different sums of which the 100*l.* is composed, &c., and that relief they have not asked. They have only asked a distinguishing of the thirty-eight *estates* by metes and bounds, not of the particular sums due in respect of each.

On the 9th of December the VICE-CHANCELLOR delivered the following judgment :—

After stating the object and the material allegations of the bill, he proceeded thus :—There is no doubt that, as to rents, this Court will give relief of the kind asked ;

on this ground, that there has been a long usage of payment of rent, but that, by reason of accident or lapse of time, the boundaries have become confused, and the lands out of which the rents issue, cannot be ascertained. On this double ground of usage of payment, and of difficulty in the way of obtaining a legal remedy, a Court of Equity will give relief. There is a series of cases on this subject for, at the least, two centuries from the time of Lord *Coventry*, which has established this head of equity. I will only refer to two or three of them. There is one early case in the eighth of *Charles* the First, *Harding v. Countess of Suffolk* (a), which was a bill for arrears of a rent-charge, and relief was granted on the ground of confusion of boundaries. There is another case of *Collett v. Jaques* (b); that was a bill claiming a rent of 5s., alleging 12 years of arrears to be due in respect thereof. It was alleged that the deeds were lost, but that the rent had been continually paid till within twelve years. A decree was made for the arrears and for the growing rent, because it was uncertain what kind of rent it was, and so there was no remedy at law. Then there is another case, *Cox v. Foley* (c). In 1733, there is the case of *The Duke of Bridgewater v. Edwards* (d). [His Honor stated the circumstances of that case.] In 1734, there is the case of *Holder v. Chambury* (e). That was a bill by the lord of the manor for the arrears of a quit rent. The Plaintiff did not show any difficulty which hindered him from recovering at law, but said that his right would appear by the writings in the Defendant's custody. Lord *Talbot* said, "There may be a case so circumstanced as to make a bill of that kind proper, as

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(a) 1 Rep. in Chanc. 33.

(b) 1 Chanc. Cas. 120.

(c) 1 Vern. 359.

(d) 6 Br. P. C., edit. Toml.

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(e) 3 P. Wms. 256.

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when the lands out of which it is claimed, are wholly uncertain, and when the days on which the same is payable are also uncertain." Then there is a case of *Benson v. Baldwin* (a); there Lord *Hardwicke* laid down this head of equity most distinctly. He said, "Where a man is entitled to a rent out of land, and through process of time the remedy at law is lost, or become very difficult, this Court has interfered and given relief upon the foundation only of payment of rent for a long time, which bills are called, bills founded upon the *solet*." That case clearly lays down the principle, and the doctrine is received and adopted by Lord *Redesdale* in his *Treatise on Equity*, p. 117. On this point I will only refer to two more cases: *The Duke of Leeds v. Powell* (b), and *Duke of Leeds v. Corporation of New Radnor* (c).

If, then, this were a case of rent, there would be no difficulty; but it is not so. It is a case of payments accruing, as it is alleged, on the decease of a former tenant. One class of payments is alleged to be due in lieu of *heriots*; and another class of payments is alleged to be due by way of and in lieu of *reliefs*.

Now, in respect of *heriots*, looking to the old law on the subject, going back to the *Anglo-Saxon* times, and thence coming down to the time of *Bracton*, originally it would seem, that a heriot was merely the best chattel payable out of the goods of the deceased tenant. It had nothing whatever to do with the inheritance, and was payable only out of the goods of the deceased tenant. *Spelman*, in his *Posthumous Works*, chap. 18, p. 32, says it was paid for the tenant that died, and out of his goods; the *relief* for the tenant that succeeded, and out

(a) 1 Atk. 598.

(b) 1 Ves. sen. 171.

(c) 2 Br. C. C. 338, 518.

of his purse, the *heriot*, whether the son or heir enjoyed the land or not, and whether the land was fallen into the lord's hands or not. Suppose a tenant died without heirs, so that the land escheated to the lord, and the lord took the land; nevertheless, *heriot* would be payable out of the goods of the deceased; but there would be no *relief* payable, because there was no heir. Bracton, fol. 84, numero 1, says, "Fit quædam præstatio quæ non dicitur relevium, sed quasi sicut herietum quasi loco relevii, et quod dari debet aliquando ante sacramentum fidelitati, aliquando post." In point of form one would suppose a heriot never could be the subject of distress; but there is no doubt that, for a long time past, one species of heriot has been the subject of distress, that is, heriot *service*. There are two kinds of heriot; heriot *service* and heriot *custom*. Heriot *service*, which was originally an incident of tenure; heriot *custom*, which is not an incident of tenure. The distinction between heriot *service* and heriot *custom* is this:—As to heriot *services* they are the subject of distress; heriot *custom* is not necessarily so. That a chattel payable out of the goods of the deceased tenant, should be recoverable by distress against the incoming tenant, is an anomaly, but so it is; Blackstone, vol. 3, p. 14, says, "As for that division of heriots which is called heriot *service*, and is only a species of rent, the lord may distrain for this as well as seize."

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Now, leaving here for a moment the subject of the heriots, and passing to the payments in lieu of *relief*. *Reliefs*, though not *services* strictly, are an incident of service, for which the lord may distrain as an incident of tenure: Coke Litt. 83. a. sect. 12. But if a relief is not existing by reason of *tenure*, but by *custom*, the lord cannot distrain as of course; but to establish his right to distrain, must show a custom of distress, as well as a custom of

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relief. That is established by the case of *Hungerford v. Haviland (a)*, and I do not doubt or question the law of that case.

Now, in this case, as to the relief being by *custom*, if that were the only question, the Plaintiffs sufficiently show the relief to be by custom. The difficulty is about the right to distrain. There is also a further difficulty in this case: that though there is an allegation about confusion of boundaries, the Plaintiffs, instead of resting on the mere fact of uncertainty in ascertaining the boundaries, as their ground, have endeavoured to reduce it to some certain statement, and have failed.

As far as regards the heriots and the reliefs, I must take the allegations of the bill to represent that the heriots are heriot *custom*, and that the reliefs are payable by *custom*. The first point is stated in the bill, not certainly in distinct terms, but still so as to lead to that inference. [The Vice-Chancellor read the allegations, pp. 270, 271. He referred also to the allegation as to confusion of boundaries in p. 279, and proceeded:—] This is no doubt a sufficient allegation as to there being a confusion of boundaries. The doubt is, whether there is a sufficient allegation of the payments issuing out of the lands, being the subject of distress. There is an allegation of a right to distrain, but no allegation of an express *custom* to distrain; and it is open to doubt whether that is a satisfactory way of alleging a custom. There is, it is true, this allegation, that, on the death of the late Lord Bolton, the Plaintiffs, as lords of the manor, *became entitled* to receive from and be paid by, &c. [The Vice-Chancellor referred to the passages in

(a) Sir W. Jones' Rep. 132; and 3 Bull. 323.

p. 278.] So, with regard to the reliefs, the allegation is to the same effect, that the Plaintiffs, on the death of the late Lord *Bolton*, became entitled, as lords of the manor, to be paid the compositions for relief. There is this difficulty with regard to the allegation as to the confusion of boundaries immediately following. [His Honor referred to the passage in p. 279.] Whether, assuming that the boundaries are, as is alleged, confused,—assuming that there are no means of ascertaining the particular lands out of which the payments for heriots and reliefs are issuing, there would be any legal remedy; whether there is such a right of *distress* alleged, that if the boundaries were discovered, there could be a legal remedy.

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Now, before proceeding further, I will, with reference to the *reliefs*, state the reason why I think they must be taken to be customary. The lands appear to be freehold, though customary freehold,—subject to the custom, they are freehold. Now the tenure of lands held by freehold tenure of a manor, is not like that of lands held in *villein socage*, but, subject only to the custom, like that of lands of proper freehold tenure; it does not, except in being subject to the custom, differ from common socage land. In 2 Black. 149, it is said, “But, with regard to certain other copyholders of free or privileged tenure, which are derived from the ancient tenants in *villein socage*, and are not said to hold at the will of the lord, but only according to the custom of the manor, there is no such absurdity in allowing them to be capable of enjoying a freehold interest; and therefore the law doth not suppose the freehold of such lands to rest in the Lord of whom they are holden, but in the tenants themselves, who are therefore sometimes called customary freeholders, being allowed to have a freehold inte-

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rest, though not of a freehold *tenure*." Now, as to free *socage* lands, the relief incident to tenure, was one year's rent. Customary relief might be more or less; but the relief in respect of free lands, was a settled relief of one year's rent. There is no allegation, it is true, in this bill, that the year's quit rent for each of the thirty-eight estates is ascertained; but the relief stated to have been payable on the death of the late Lord *Bolton* is 22l. 18s. for the amount of relief for the thirty-eight estates. Now that is more than one year's rent; that, therefore, amounts to an allegation that the relief payable, is not as an incident of tenure, but by custom.

This minute consideration of the allegations of the bill would not, in this case, be necessary, so far as my decision will affect the parties, because it would principally affect the question of costs, and this is a case in which, whatever were my decision, I should give no costs. If I overrule the demurrer, it will be without costs; if I allow it, it will be without costs, and with liberty to amend. But I am bound to look at the case strictly; and, in the absence of sufficiently positive allegations, I am obliged to collect from the allegations of the bill, those inferences which I think justly flow from them. And I think the balance of inference to be collected is, that the bill alleges that both the heriots and reliefs are by *custom*, but does not allege a *custom of distress*. I am bound, therefore, consistently with what I have stated to be my opinion of the law applicable to the relief claimed by this bill, to allow the demurrer. In doing so, I shall give leave to amend, and no costs.

SILVER v. STEIN.

THIS was a motion among other things under the 44th section of 15 & 16 Vict. c. 86, for the appointment of a person to represent the estate of *W. H. Lovewell*, who died in the *Mauritius*, and for the payment into Court of a sum of money received by the Defendant *Arnold*.

The suit was a creditor's suit for the administration of the estate of *W. H. Lovewell*, and was instituted against *Stein* and another, the colonial representatives of the deceased, and against *G. Arnold*.

The testator *W. H. Lovewell* had by his will given the residue of his estate to his mother, who died, making *G. Arnold* her executor. *G. Arnold* had received from the colonial representatives of *W. H. Lovewell*, as the representative of *Mrs. Lovewell*, a sum of about 70*l.* as and for the balance of their testator's estate. There was no representative of the testator in this country.

The Defendant *Arnold* swore that he was a creditor of *W. H. Lovewell* to an amount exceeding the 70*l.*, for maintenance of *Mrs. Lovewell* during the lifetime, and by the express order, of *W. H. Lovewell*.

The Vice-Chancellor, on the first point, was referred to the case of *Groves v. Lane* (a).

(a) 16 Jur. 1061.

The representative of *B.* was also a creditor of *A.* Held, that, in a creditor's suit, the representative of *B.* could not be compelled to bring into Court the money so paid to him by *A.*'s colonial representatives.

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15th December.

Practice.
Chancery
Amendment
Act.
Personal Representative.
Assets,
Right of following.

The 44th section of the 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the Court.

A. died in a colony, and made colonial representatives and bequeathed his residue to *B.*, who afterwards died. *B.*'s representative received from *A.*'s colonial representatives his residue.

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Mr. *Nalder*, for the motion.Mr. *Greene*, *contrâ*.

The VICE-CHANCELLOR :

As to the first part of the notice of motion, the 44th section of the Chancery Practice Amendment Act does not appear to me to be intended to apply to cases where the estate to be represented, is the very estate which is being administered in the suit ; but only to those cases where a certain individual who, when living, was interested in the suit and was made a party, has died ; and then the Court may either appoint some person to represent that party, or may proceed without any representative.

As to that part of the notice of motion which prays an order against the Defendant *Arnold*, that he may pay into Court the money which he has received, I am of opinion that such an order ought not to be made.

The Plaintiff, a creditor of the original testator—I assume him at least to be a creditor, as he so represents himself—has a right to go against the legal personal representative, if he is administering the assets of the testator, and as against him, he might have the money in his hands brought into Court. But this Defendant is not the representative of the testator at all. He is a person who, in his character of personal representative of the legatee of the testator, has received a sum of money as the balance of the testator's estate remaining in the hands of the colonial executors. There is no doubt, of course, that a creditor may follow the assets of his debtor ; but not into the hands of another creditor ; he may follow them into the hands of a person having no right.

But here the person who has received the money says

he has received it as the personal representative of the legatee of the original debtor, and he does not admit that he has it in his hands. As against the legatee's estate, it might no doubt be recovered, if she was not entitled to it.

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But here the Defendant *Arnold* says that even if his testatrix was not entitled, he is himself a creditor of the original testator to a larger amount than the sum received by him, and that in that character he is entitled. And if, having such a right, he has got the money in his hands, I think it very questionable whether the Court could compel him to give it up. I think there is on this motion no ground for ordering the money into Court.

1852:
20th November.

Will.

Appointment.

Construction.

A. made his will, and gave personalty to *B.*, a married woman, for life, and after her death as she should appoint, and in default of appointment, to her husband; and if she should survive him and make no appointment, then to her children.

B. had three children, and by her will she appointed, after her husband's death, 2000*l.* between two of her children, and 1500*l.* to the other, and she appointed the residue to her three children by name, in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children; () *l.* to another, and the residue to the third

Held, that the husband had no power to exclude either of the children; that his appointment was therefore bad; and that the appointment of the wife took effect in favour of the three children.

WHITE v. WILSON.

LORD CHEDWORTH by his will gave 13,000*l.* in trust, to invest the same in the funds, and pay the interest thereof to *Mary Howard*, then the wife of *William Howard*, to be applied to the use of the said *Mary Howard* separate from her said husband or without being liable to his debts or subject to his control; and after the decease of *Mary Howard*, then to pay the principal money to such person as she, the said *Mary Howard*, should direct and appoint; and in case she should leave no such testamentary direction, then he willed, that the said principal money should be paid to her husband, the said *William Howard*; and in case the said *Mary Howard* should survive the said *William Howard*, and should not leave any such testamentary direction, then the said testator willed that the said principal money should be paid to the children of the said *Mary Howard*, or in case they should be infants, to such person or persons as should be appointed guardian or guardians to the said children. *Mary Howard* made and published her last will and testament, or testamentary appointment in writing, bearing date the 23rd March 1842, purporting to be in pursuance of the said power given or reserved to her in and by the said will of the said *John*, Lord *Chedworth*, and thereby, after reciting that the late Lord

Chedworth in and by his last will, dated on or about the 18th July 1804, gave to *Richard Wilson* and *Thomas Penrice*, his executors, the sum of 13,000*l.*, in trust to invest the same in the funds and pay the interest thereof to her, to be applied to her use separate from her husband, or without being liable to his debts, or subject to his control, and after her decease then to pay the principal sum to such person as she should direct and appoint by testamentary disposition; and reciting that, in a suit in Chancery, in a cause entitled *White v. Wilson*, the said legacy or sum of 13,000*l.* was laid and invested in the purchase of 19,082*l.* 11*s.* 4*d.* Bank 3*l.* per Cent. Annuities which then stood in the name of the Accountant-General, in trust in the said cause, to a separate account in her name, and she was in the receipt of the dividends thereof as directed by the said will and by an order of the said Court, made in the said cause, pursuant to the power given and reserved to her in and by the said will, she thereby *directed and appointed, gave and devised* the said 19,082*l.* 11*s.* 4*d.* Bank 3*l.* per Cent. Annuities, purchased with the said legacy or sum of 13,000*l.*, and standing in the name of the said Accountant-General, in trust in the said cause of *White v. Wilson* to her account, or howsoever otherwise the same might be, unto her husband the said *William Howard*, upon trust and to the intent that he should, within six months after her decease, transfer unto her son *John William Howard*, or in his name, 1000*l.* Bank 3*l.* per Cent. Annuities, part of the said fund of like Annuities, for his own use and benefit, and also transfer to her son *Frederick Robert Howard*, or in his name, 1000*l.* Bank 3*l.* per Cent. Annuities, other part of the said fund of like Annuities, for his own use and benefit, and also transfer unto or in the name of her daughters *Harriett* and *Mary Ann Howard*, or into the name or names of any

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trustee or trustees she might appoint 5000*l.*, 3*l.* per Cent. Bank Annuities, further part of the said fund of like Annuities, to her own sole use and benefit, separate and apart from any husband she might happen to marry, and not to be subject to his debts or liable to his control in any manner howsoever, and also transfer unto her said husband, or into his own name, 5500*l.* Bank 3*l.* per Cent. Annuities, further part of the said fund of like Annuities, to enable him to discharge certain liabilities devolving upon him at her decease, and for his own use her will; and she did thereby direct that, after payment of such legacies, her funeral expenses, and the charges of proving that her will, and all incidental costs, charges, and expense, which the said *William Howard* might be put to in or about the execution of that her will, and otherwise relating thereto, that the residue of the said fund of Bank Annuities be set apart and invested in Bank Annuities or on mortgage as he might think best, and the dividends or interest thereof be received and retained by him the said *William Howard*, during his life, for his own use and benefit; and as to the principal sum constituting such residue, she directed and appointed, gave and bequeathed the same, after the decease of her husband the said *William Howard*, the sum of 2000*l.* of lawful English money, in equal shares, to and between her said sons *John William Howard* and *Frederick Robert Howard*, or their respective administrators and executors; also the sum of 1500*l.* of like lawful money to her said daughter *Harriett Mary Ann Howard* for her own like, sole, and separate use as thereinbefore mentioned, or her executors and administrators; and also the sum of 100*l.* lawful English money, to her grand-daughter *Catherine Harriett Howard*, or her executors and administrators, and the residue thereof to her children the said *John William Howard*, *Frederick*

Robert Howard, and Harriett Mary Ann Howard, or their respective executors and administrators, in such manner as her said husband William Howard should, in and by his last will, direct and appoint.

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Mr. Howard duly made and signed his last will and testament or testamentary appointment, in writing, bearing date the 14th August 1851, and which was in the words and figures following; that is to say, "This is the last will and testament of me, *William Howard*, of number 42, *Western Villas, Blomfield Road*, in the county of *Middlesex*, Gentleman. Whereas, in and by the last will and testament of my late wife *Mary Howard*, she hath directed that the residue of the sum of 19,082l. 11s. 4d. 3l. per Cent. Bank Annuities, in her will more particularly mentioned, after the transfer and payment thereof of the funeral and testamentary expenses, legacies, debts, and liabilities therein referred to, shall, upon my decease, be paid to *John William Howard, Frederick Robert Howard, and Harriet Mary Ann Howard*, in such shares and proportions as I shall by my last will and testament direct or appoint. Now in exercise of such power, *I do hereby direct, order, and appoint the sum of 500l. sterling to be paid to the said Harriett Mary Ann Howard; the sum of () sterling to be paid to the said Frederick Robert Howard, (he having been already more than sufficiently provided for,) and the residue and remainder thereof to be paid to the said John William Howard.*"

Mary Howard died in 1851, leaving three children surviving. *W. Howard* died in 1852.

A petition was now presented on behalf of *John William Howard* and another, claiming a sum as residue

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(after raising the several sums of 2000*l.*, 1500*l.*, and 100*l.*, given by the will of Mrs. *Howard*, and the 500*l.* given by the will of *W. Howard*.) as passing to him under the will of *W. Howard*.

Mr. *Daniell* and Mr. *C. Clement Berkeley*, for the petition.

It will be argued on the other side that the appointment by *W. Howard* is void, and that if that appointment is void, the children of the marriage take under the appointment of Mrs. *Howard*. Our contention is, that the will of *W. Howard* is a good execution of his power. Mrs. *Howard* made a certain division between her children; it is only the *residue* that she appointed to her children, as her husband should appoint. Although, therefore, the husband excluded one child as to any share in the *residue*, that child is not altogether excluded. The two instruments, the will of the wife and the will of the husband, must be read together; and if you so read them, all the children take some share.

But if the appointment by the father is not good, then we say there is no appointment to the children by the wife. Her appointment is as her husband shall appoint: he does not appoint, and then the limitation over to him in the original gift takes effect. The children to claim, must claim by an appointment strictly and properly so called, or by implied gift. Now the wife has not *appointed*, and she cannot *give*, because she had no *estate*; and the husband not having appointed, the limitation over to him by the original gift takes effect, and his will operates upon his estate. Therefore the Petitioner who claims under his will is entitled.

Mr. *Amphlett*, for *F. R. Howard*, who claimed as

one of the children entitled in default of appointment of the husband.

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The question is, What is the construction of the power given to *W. Howard*? He had no power of excluding any child. The fact of the excluded child having another provision has nothing to do with the case. Where there is a gift to *A.*, remainder to *A.*'s children as he shall appoint, and he makes no appointment, the children shall take; *Casterton v. Sutherland* (a), *Martin v. Swannell* (b), *Jones v. Torin* (c), *Alloway v. Alloway* (d). That is this case. The argument of the Petitioner is, that here the wife had no estate, but only a power of appointment. But her power was general, and therefore she might give, whether, strictly speaking, she had an estate or not. The husband having no power to exclude any child, his power was in fact not exercised, and the children take under their mother's will. He cited *Kemp v. Kemp* (e), as to the question of a power to make an exclusive appointment.

Mr. *Speed*, for another child in the same interest.

The only appointment which takes effect is that made by the wife. The power given by the wife is a general power; she exercises it first by express appointment to the children; then she qualifies that by delegating a power to her husband. Now, either she had no power to do that, and then the delegation is a nullity, and the express appointment stands good; or she had power to do it, and if she had, then her husband has made no appointment, and the gift by the wife to the children, no appointment being made by the husband, takes effect.

(a) 9 Ves. 445.

(b) 2 Beav. 249.

(c) 6 Sim. 255.

(d) 4 Dru. & War. 380.

(e) 5 Ves. 849.

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Mr. Daniell, in reply.

The authorities cited do not bear on this case. The intention of the whole will must be looked at. The mother meant that there should be equality. *Mr. Howard* had power to make an exclusive appointment (1 Sug. 537, chap. on "Exclusive Appointments"). Next, if the father had no such power, and if his will is not good, then he has made no appointment, and the original appointment to the husband, in default of appointment to the children, takes effect.

The *Vice-Chancellor* referred to the will of Lord *Chedworth*, and proceeded as follows:—The wife exercised her power, a general absolute power to appoint, at any rate by will. Now it is not questioned that her will was a valid execution of her power, and by it, reciting her power, she appoints. [The *Vice-Chancellor* referred to the will of *Mrs. Howard*.] Now it is not, as I understand, contended that *Mrs. Howard* had no power to delegate to her husband her power to appoint, and if it had been so contended, I should decide that the argument could not be sustained. It is clear that when a person has an absolute power of appointment, he may appoint to certain persons or classes of persons in such shares as another person shall nominate. The question then is, did *Mr. Howard* exercise his power, and what is the effect of his act? [The *Vice-Chancellor* referred to the will of *Mr. Howard*.] Now, with reference to the intention of *Mr. Howard*, it is contended that he must have intended that *F. R. Howard* being, as he recites, more than sufficiently provided for, he did not intend to appoint to him. But it is not, I think, at all clear that he did not mean to appoint something to *F. R. Howard*. Assuming that the will was prepared, as stated, by a professional person, with blanks to be filled up, it seems that he filled

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up the blank left for *Harriett's* name, and left that for *Frederick Robert* not filled up. That does not conclusively show that he intended to leave the blank altogether. He may have felt hesitation, and deferred the consideration of what should be inserted to be paid to his son *F. R. Howard*. If he had intended to appoint nothing to that son, he would not have allowed the clause to remain at all; for to say, I appoint nothing to be paid to *Frederick Robert* would have been nonsense. Looking therefore at the language of the testator, there is no conclusive evidence that he intended to give nothing to this son. But even if I could suppose he had an express intention to appoint nothing to one of his children, still if the power given to him did not justify him in making an exclusive appointment, then, although if he had given, as it has been suggested, five shillings, that would have been good, yet as he has given nothing, I cannot determine that a power to appoint to three, authorizes an appointment to two. The result is, that the husband's appointment had no operation at all; as to one of the children he has appointed nothing, and such an exclusive appointment was not justified. The terms of the power given to him are express: the wife, having a general power, determines who are the parties to take; she does not leave it to her husband; she determines who is to take, leaving it only to her husband to determine the manner in which they should take. The question then comes, whether, on the construction of Mrs. *Howard's* will, she gives to her children, &c. [The Vice-Chancellor referred to the passage, pp. 300, 301.] Now on the authorities it is clear, that if a person, having power to give, gives to certain persons as another shall appoint, and that other makes no appointment, assuming it to be a bequest, there is an implied gift to the objects of the gift, if the power is not exercised by the party having the right to exercise it; and that being

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the effect, if it had been a *bequest* by Mrs. *Howard*, should a different construction be adopted because it is an *appointment* by her of Lord *Chedworth's* estate? The authority to her is general and absolute. I assimilate the questions of bequest and appointment, merely for the purpose of determining whether there is any different rule of construction as between the two; and I think there is no reason for saying that there is any distinction. I am on the whole of opinion, that the effect is, that Mrs. *Howard* has well appointed the residue of her property, in default of her husband exercising his power, to the three children named; and the order will be accordingly, that the residue will be divided between those three children.

ROBINSON v. HARRISON.

A PETITION was presented by a single woman, and answered on the 1st December. On the 2nd, before the petition was in the paper, she married.

1852:
11th December.
Practice.
Amending Petition.
Stamp.

Mr. *Metcalf* applied for leave to amend the petition, by making it the petition of the husband and wife, without a fresh stamp.

The VICE-CHANCELLOR, having conferred with the other Judges, held with their concurrence, that the petition might be amended without a fresh stamp.

Re. Ken. 7. W. R. 1877.

BOWEN v. PRICE.

IN this case interrogatories were filed; and an office copy was left at the office of the Defendant's solicitor.

1852:
Practice.
Interrogatories,
Delivery of.

Held, with the concurrence of the other Judges, that the copy of the interrogatories had not been properly *delivered* within the meaning of the 12th sect. of the 15 & 16 Vict. c. 86, and 17th Order of 7th of August 1852.

1852 :
21st December.

*Trustee.
Release.*

A trustee, paying the trust-money in strict accordance with the tenor of the trusts, is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts.

Where a trust was created by parol for *A.* for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life and remaindermen called for payment;

Held, that the trustee might lawfully insist on a release under seal.

KING v. MULLINS.

IN this case a trust had been created by parol of a small sum of money for *A.* for life, remainder to *B.* for life, and to pay the expenses of her funeral, remainder to her two children. *A.* died, and then *B.* and her children joined in calling upon the trustee to pay the trust fund to them. One question was, whether the trustee was entitled to a release under seal, or whether only to a receipt expressing the nature and satisfaction of the trusts.

Mr. *Lewin*, for the *cestuis que trust*, cited *Chadwick v. Heatley* (a), *Fulton v. Gilmour* (b). Those cases decide that on paying over the trust fund to the parties entitled, the trustee is not entitled to a release; he is entitled to have his accounts investigated, and to have a statement in writing that those accounts have been investigated and are correct, and to have a receipt in full of all demands in respect of the property accounted for. He cannot insist upon a release by deed; but even if he could call for a release where there had been open accounts or intricate trusts, and long and complicated transactions in respect of them, he cannot, in a case like this, of a simple trust of an ascertained sum of money, require more than a receipt, which is, for all purposes in such a case, as good and as effectual a discharge as a release.

Mr. *Wigram* and Mr. *Roxburgh*, for the trustee.

(a) 2 Col. 137.

(b) Hill on Trustees, 605.

In *Chadwick v. Heatley* the trusts were all exhausted, except the ultimate trust in favour of *Adam Chadwick* and *Francis Chadwick*. Nothing remained to be done except to pay over the fund to them, they being then, according to the express terms of the trust, entitled to the immediate possession. All that was decided in that case was, that where the effect of the trusts is beyond all dispute, and the only question is, whether the account is correct, and the balance correctly ascertained, the trustee is entitled to have his accounts examined and passed, and to have a receipt in full of all demands in respect of the accounts. *Fulton v. Gilmour* is also distinguishable; both those cases relate to cases of account, and they do not govern a case like the present, of a clear sum of money in the hands of one in trust for another; in such a case, if the trustee has only a receipt, that might be met, at any rate at law, by parol evidence to prove that the money had never been paid, or being paid, it had been returned. The trustee ought not to be placed in a situation of danger, where, by loss of evidence, he might have to pay twice over. If he had a release under seal, parol evidence could not be given against the deed. They cited *Goldsmid v. Goldsmid*(a). In that case a testator bequeathed certain funds in trust for his wife during her widowhood, and after giving her a power to appoint them by deed or will, provided she did not marry again, directed that, upon her second marriage or her death, without having exercised her power, they should sink into the general residue of his estate. The widow executed a deed purporting to be an appointment of the property to the residuary legatees, in the same proportions in which they would have been entitled to it under the residuary clause, and she and they

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(a) 1 Turn. & Russ. 445.

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concurrent in assigning the funds upon trust for the residuary legatees, but the Court refused to act upon the appointment and assignment during the widow's life.

In that case the Court said, "the Plaintiff's claim under two titles, neither of which is at present complete; the power is at this moment worth nothing, for the widow may marry again; the title under the residuary clause is equally worthless, for there may be a good exercise of the power. Can then two incomplete titles make one complete title? Can two contingent defeasible rights make one sure and indefeasible right? Separately neither title is good, for there is an objection to each; how then can they become good by conjunction? It is of no avail to say that ultimately a time will come when in one character or another the persons who now apply will be entitled to the fund. They must wait till that day arrives. It is not the habit of the Court to intermeddle with property given by a testator's will upon specified trusts, till the time comes when the property may be disposed of in the very mode and form which the testator has prescribed. It was the intention of the testator that the funds in question should be subject to a power of appointment in his wife, which, as it depended on the contingency of her dying a widow, was to remain in suspense so long as she lived. Till her death the destination of the property was not to be fixed, there was a restriction on the absolute disposal of it. If we dispense with this restriction, we do not execute the intention of the testator, but lend the aid of the Court to enable parties to set that intention aside."

Mr. *Lwin*, in reply.

The VICE-CHANCELLOR:

On the question whether it is the strict right of a

trustee to demand a formal release; I am of opinion that in the case of a declared trust; where the trust is apparent on the face of a deed; the fund clear; the trust clearly defined; and the trustee is paying either the income or the capital of the fund; if he is paying it in strict accordance with the trusts, he has no right to require a release under seal. It is true that in the common case of executors, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation; therefore he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund; and therefore it is usual to give a release; but such a claim on the part of a trustee would in strictness be improper, if he is paying in accordance with the letter of the trust. In such a case he would have no right to a release. That, however, is not this case; here there is no deed at all, no writing declaring the trust; there is a small sum of money in the hands of the Plaintiff, with nothing but a verbal expression of the trusts. The evidence showing what the trusts were, indicates that upon the very tenor of those trusts, they could not be completely carried out until the death of the tenant for life. Considering that, in the first place, there was no writing to indicate either what the trusts were or the amount of the trust fund; and, in the second place, that what the trustee has been asked to do is not in accordance with the tenor of the trusts, I am of opinion that in this case it was not illegal in the trustee to demand a release by deed.

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1852 :

21st December.

*Pleading.**Right to sue.**Nuisance.*

A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade which destroyed her rest, and depreciated the value of her property.

The evidence as to the nuisance was conflicting, and no action had been brought.

Held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages; and there could be no injunction till the right was established at law.

And *semble*, that in respect of the mere personal nuisance, the wife could not sue alone; and that as to mere depreciation of her property she could not maintain a bill, as that would not amount to nuisance.

WHITE v. COHEN.

THE bill in this case was filed by *Jane White*, by her next friend, against *Philip Cohen*, against *Charles Frederick White*, the husband of the Plaintiff, and against some other persons. It alleged that the Plaintiff's father bequeathed to her certain leasehold property at *Kennington*, and that on the marriage of the Plaintiff with the Defendant, *C. F. White*, a settlement was executed, by which certain houses, viz. No. 18, *Pilgrim-street*, Nos. 7 and 8, *Montford-place*, and 17 and 19, *Pilgrim-street*, were settled on the Plaintiff for her life for her separate use. That in the month of August 1851, *Ward* and *Patteson* erected upon land of their own, closely adjoining Plaintiff's leasehold houses, a glass bottle manufactory, and thenceforth conducted the business of such factory so as not to be a nuisance or annoyance to the neighbourhood, or to the Plaintiff, or the tenants of her dwelling-houses; that in the month of August 1852, *Ward* and *Patteson* sold their factory and business to the Defendant *Philip Cohen*, who had since conducted and carried on in the said factory the said business of glass-bottle making in such a manner as to become an intolerable nuisance and annoyance to the neighbourhood, and, in particular, to the Plaintiff, and her husband and family, and to the tenants of the said dwelling-houses. The Plaintiff and her husband and family resided in one of the houses, No. 7, *Montford-place*, and the others were let to respectable tenants at rents varying from 18*l.* to 26*l.* per year; and then

followed these allegations :—The works of the Defendant, *Philip Cohen*, at the said factory have lately been, and still are, carried on chiefly or very much by night, and also on Sundays, and the noise occasioned thereby is so great as to disturb the rest of the several persons residing in the said dwelling-houses, and to prevent their sleeping. The mode in which the said works are carried on by the Defendant, *Philip Cohen*, tends greatly to depreciate the value of the said dwelling-houses, and several of the tenants threaten to leave the same in consequence thereof.

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The bill prayed an injunction to restrain the Defendant *Cohen* and his agents from carrying on the said business and works of the said glass-bottle making at the said factory occupied by him, or from carrying on the same in such manner as to occasion any nuisance, disturbance, and annoyance to the Plaintiff, and her husband and family, residing in their said dwelling-house in *Montford-place*, or to the tenants and occupiers of the others of the said dwelling-houses in *Montford-place* and *Pilgrim-street*.

A motion was now made for an injunction in the terms of the prayer of the bill against *Cohen*. Affidavits were filed in support of the motion, the substantial allegations of which were as follows :—That the works of the Defendant had lately been and were still chiefly carried on by night, and also on Sundays, and the noise occasioned thereby was so great as to disturb the rest of the deponents and of the other persons residing in the Plaintiff's dwelling-houses, and to prevent their sleeping at night; they said that such disturbances at night had not been confined to particular instances, but had been continued generally, and in a greater or less degree since

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the Defendant had carried on his works. The Plaintiff's affidavit said that the noise principally arose, as they believed, from striking the glass with heavy irons, which created very great disturbance in the neighbourhood, and was an intolerable nuisance to them and to their neighbours, particularly at night and on the Lord's day. The mode in which this alleged noise was produced was more fully explained by one of the witnesses practically engaged as a foreman of glass works as follows:—"In the process of making bottles, a portion of the glass necessarily adheres to the blowing-irons, and it being essential that the irons should be perfectly clean and free from glass when used, the adhesive matter or moils has to be constantly removed by striking the same with a heavy iron, and the noise caused thereby is loud and continuous, and of such a nature as to disturb the tenants and inhabitants of the various houses near the said factory, particularly the inhabitants of those houses immediately opposite the said factory." The same witness, in another affidavit describing the manner in which the adhesive glass must be struck off, said that the noise created by striking off the moils by means of a chest-knife weighing a pound and a half must, of necessity, be loud; and, as he knew from his own experience, is heard distinctly at the distance of eighty feet, with the doors of the factory closed. (It was part of the Plaintiff's evidence that the works of the Defendant's factory were continually carried on with the doors open.) The Plaintiff swore that the mode in which the Defendant carried on his business tended greatly to depreciate, and did, in fact, depreciate, the value of her property, and that several of the tenants threatened to leave in consequence. The fact of the great and continual noise, and of its disturbing their rest at night, was also verified by some of the Plaintiff's tenants, and they said that they

could not continue as tenants, and did not intend to continue to occupy the premises occupied by them, unless the nuisance were discontinued. Then it was sworn that the houses 17 and 18, *Pilgrim-street* were distant fifty-three feet from the factory, that 19, *Pilgrim-street* was sixty-nine feet from it, and 7 and 8, *Montford-place* were seventy feet from it. This was the material evidence on the part of the Plaintiff.

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The affidavit of the Defendant *Cohen* negatived generally the general allegation of the Plaintiff's evidence, as to the noise being a nuisance. The particular negative allegations were, that he had never worked on Sundays, except on three occasions under particular circumstances. He said that the noise, such as there was, was very inconsiderable, and arose from striking the adhesive glass by means of a chest-knife weighing a pound and a half, and not by means of a heavy iron. He did not deny that he worked by day and by night; but he said that to do so was almost essential to a glass manufacturer who hoped to make any profit by his business. Then there was the evidence of several witnesses living in the immediate neighbourhood, who swore that they never were prevented from sleeping by the noise of the Defendant's factory, and that in fact they never heard any noise from the same; and one witness deposed that he returned frequently to his house very late at night, and, while waiting for admission to his own house, never heard any noise in the said factory. Mr. *Ward*, who, as the Plaintiff alleged and swore, carried on the business without creating any nuisance, proved that his firm had, while carrying on the business, worked at all hours, sometimes working from seven in the morning till eleven at night, and recommencing at three in the morning, and sometimes commencing at five and continuing till eight, and that at one time for a period of six weeks,

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they had worked night and day. He said that in cleaning their blowing irons they used a heavier chest-knife than the Defendant, viz. one weighing two pounds. Then there was the evidence of a workman who had been in the glass manufacturing trade for thirty years, who explained the necessity of working night and day, in the following manner:—He said the work at all large glass factories is continued night and day, and that the reasons why such is the case are, among others, first, that it is necessary to keep the furnaces constantly heated, because it takes at least twelve hours to raise them to a heat sufficient for melting glass; secondly, it is necessary that the pots used for melting the glass should always be supplied with metal, as otherwise they would in all probability break; and, thirdly, it is necessary that the metal in the pots should be used up within twelve or eighteen hours, as it would otherwise become of an inferior quality to that intended; that, in order to keep up the furnaces to a proper heat, it is necessary that some competent person should be always in attendance to watch them; and that the expense of such attendance and the consumption of fuel would be wasted, were not the work to be continued during the night. Then there was an affidavit of another glass manufacturer, who said he had visited and examined the Defendant's factory, and had examined his blowing-irons and chest-knives, and he said that while the door of the factory was kept closed, it would be *impossible* for any person residing in the houses designated by the Plaintiff to hear any noise occasioned by striking the moils from the blowing-irons; and that if the door of the factory were kept open, it was utterly impossible that the noise occasioned by cleaning off the moils from the blowing-irons, could disturb the rest of the persons residing at those houses, or prevent their sleeping during the night.

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Such was the material evidence on both sides.

Mr. *Bacon* and Mr. *J. T. Humphry*, for the motion.

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The *Vice-Chancellor*, before hearing them upon the merits, suggested a preliminary difficulty arising out of the frame of the suit; whether the Plaintiff could sue alone, or by her next friend, in respect of a personal nuisance to herself and her husband. If she sues only on the ground of injury to her *property*, that is not of itself a nuisance. Suppose the Plaintiff was away at a great distance from her property, and the bill alleged great injury to the value of her property, but no personal annoyance to herself; it has been repeatedly decided that mere diminution of value in property, is not a ground of proceeding as for a nuisance.

Mr. *Bacon* and Mr. *Humphry* cited *Elmhirst v. Spencer* (a) and *Soltau v. De Held* (b).—This is a case of mixed kind: it is injury to property, productive of nuisance. It is not mere nuisance personally to the Plaintiff and her husband, but it is that species of annoyance which prevents her, through herself and through her tenants, from enjoying her property in the way in which she is entitled to enjoy it, viz. as her separate estate. It would be improper to join her husband with her, because the nuisance is not mere personal nuisance, but nuisance combined with injury to property; and he has no interest in the property. It may be true that mere depreciation of property is no nuisance; but all nuisance is in respect of the enjoyment of some right of property; and there can be no nuisance in point of law, except as connected with some such enjoyment.

(a) 2 McN. & Gor. 45.

(b) 2 Sim. N. S. 133.

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Mr. *Daniell* and Mr. *Elderton*, for the Defendant, were not called upon.

The VICE-CHANCELLOR :

The question now before me is, whether, until an action has been brought, the Defendant ought to be restrained from carrying on his works: that is the only question. It is not disputed that this Court cannot permanently restrain acts alleged to be nuisance, until a Court of Law has declared that they do constitute nuisance. If in the interim, on a bill being filed, I restrain the Defendant, I am *pro tanto* acting on the assumption that there is a nuisance. Now, no doubt if the nuisance, supposing it to be one in point of law, were one of an irremediable kind, one not capable of compensation, this Court might impose terms, pending the trial of the question of nuisance, to protect the property in its existing state. But in a case where the only questions are mere inconvenience to the parties by the alleged noise disturbing more or less their sleep, or in reference to the diminution of value of the Plaintiff's property; in either case the injury is not irremediable, but is capable of compensation in damages. I feel so much doubt, also, whether the Plaintiff can maintain this suit at all, that I should feel great difficulty on that ground alone; and on the whole, until it shall first have been determined at law that there is a nuisance; and, secondly, that, if there is a nuisance, the Plaintiff has taken the right course, considering that this bill rests, as it appears to me that it does, merely on the ground of diminution in value of the property; I think the only order that I can make will be for the motion to stand over, with liberty for the Plaintiff to bring such action as she may be advised.

RE BURTT'S ESTATE, AND THE BIRMINGHAM, WOLVERHAMPTON, AND DUDLEY RAILWAY.

ON this petition, the object of which was to have the dividends of a sum of money which had been paid into Court by the railway company, paid out to the Petitioners, a question arose as to the power of trustees to bequeath the trusts.

The will of *John Burtt* was as follows:—

He gave, among other things, to *John Richards* and *Robert Bromfield Potter*, their *executors and administrators*, all his leasehold messuages, tenements, or dwelling houses situate and being in or near to *Livery-street* and *Cox-street*, respectively in *Birmingham*, and all and every his ground rents payable for lands there situate, and all other his personal estate, to hold unto the said *John Richards* and *Robert Bromfield Potter*, their *executors and administrators*, upon trust out of the rents and profits thereof to pay the ground rents and all necessary outgoings, and to keep the same leasehold estate in good and sufficient repair, and subject thereto, upon trust to pay and apply the said rents and profits to and among the persons and in the manner in his will mentioned; and the said testator thereby appointed *John Richards* and *Robert Bromfield Potter* executors thereof.

1853:
11th January.

Will.

Construction.
Trustees; Power
of to bequeath
Trusts.

Bequest to *A.* and *B.*, their executors and administrators, upon trust. *B.*, the surviving trustee, by his will bequeathed his trust estates to *C.* and *D.*, their heirs, executors, administrators and assigns, on the trusts; and he appointed *C.*, *D.*, and *E.*, executors of his will. Held, that *C.* and *D.* took only the legal estate, and that neither *C.* and *D.*, by themselves, nor *C.*, *D.*, and *E.* were capable of executing the trusts.

Richards died in 1833. *Robert Bromfield Potter*
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In re
BURTT.

died in 1852, having first made his will and a codicil thereto.

By his will, which bore date the 2nd of February 1848, he gave, devised, and bequeathed all the *estates vested in him on any trust, or by way of mortgage*, to the Petitioners and to one *Thomas Clarke*, their heirs, executors, administrators, and assigns, according to the respective nature and quality thereof respectively, to hold the same upon the same trusts and for the same purposes for which he held the same, and to be disposed of accordingly; and he thereby appointed his wife executrix, and the Petitioners and the said *Thomas Clarke*, executors of his will.

Robert Bromfield Potter, by the codicil to his will which bore date the 13th of April 1852, revoked the appointment of *Thomas Clarke*, as an executor and trustee of his will, but did not otherwise alter his will so far as was material to the question.

On the petition being opened, the *Vice-Chancellor* observed, that he did not see that the Petitioners were the trustees of *Burt's* will. *R. B. Potter* had no authority to bequeath the execution of the trust. He could only pass the legal estate.

Mr. *Sargent*, for the Petitioners, then applied for leave to amend by joining the name of the widow of *Potter* to those of the Petitioners, thus making the petition that of the executors of *Potter*. He contended that if *Potter* had not attempted to bequeath his trust, his executors would unquestionably have been competent trustees; and that, by thus amending the petition, and making the trustees of *Potter's* will and *Eliza-*

both Potter all Co-petitioners, the petition would be that of both classes,—that of the legatees of the legal estate, and also that of *R. B. Potter's* executors.

1858.

In re
BURTT.

The VICE-CHANCELLOR held, that neither the Petitioners alone as trustees, nor the Petitioners joined with the other executrix, could exercise the trusts; he said the testator had himself declared that his executors as such, should not be trustees; and since by the bequest, he had taken away the legal estate from those persons who ought otherwise to have been the trustees, the appointment of new trustees was requisite.

IN THE MATTER OF HOLMES' TRUSTS,
AND OF THE 10 & 11 VICT. c. 96 (THE
TRUSTEES RELIEF ACT.)

1853 :
17th January.

Will.
Construction.
Words.

W. HOLMES by his will devised and bequeathed his freehold and leasehold estates, and the residue of his property, estate, and effects, both real and personal, to trustees, in trust to sell his freehold and leasehold estate, and to get in his personal estate, and to stand possessed of the produce, in trust, out of a competent part of his personal estate, to purchase so much 3*l.* per cent. Consols as would produce a yearly dividend of 5*l.* 12*s.*, in the joint names of the vicar, and the churchwardens, and overseers of the poor for the time being of the parish of

A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees *specially named*, except one of the classes de-

scribed. Held, that this showed that by the words *specially named*, the testator meant, *described, or mentioned*; and that all the legatees, whether *named*, or only *described*, took shares.

1853.

In re
HOLMES.

Lewisham, to be held by them upon trust, and to the intent and purpose that the vicar, churchwardens, and overseers of the poor for the time being of the said parish, and their successors for ever, should lay out the said yearly dividend or sum of 5*l.* 12*s.* yearly and every year for ever, in the purchase of seven pairs of blankets, and distribute the said blankets on *St. Thomas'* day, unless that feast should happen on a Sunday, and then on the Monday following *St. Thomas'* day, in every year for ever, to and amongst seven poor and industrious families, parishioners of *Lewisham* aforesaid, who should not be receiving parochial relief, and who should not also, during the year in which such distributions and divisions should be made, receive or have received any other gift or donation, under any charity bequeathed to the said parish of *Lewisham*.

Then followed several legacies to legatees expressly named; then "to the testator's faithful servant *Ann Burchell* 100*l.*; to his faithful servant *James Wathling* 20*l.*; to each of his other servants who should be in his service at the time of his decease the sum of 10*l.*" Then came other legacies to persons named. Then followed other bequests to classes *described*, but not expressly naming the persons constituting such classes; among these were the brothers and sisters of his late cousin *John Scatchard*; the children of his niece *Catherine Briggs*, and others; and then followed the residuary clause as to the "surplus or residue of the aforesaid trust-monies which should remain after payment of the several legacies thereinbefore bequeathed, and the purchase of the several sums of stock aforesaid, &c." The testator gave and bequeathed the same unto his several legatees thereinbefore specially named, exclusive of the objects taking under the trusts for the purchase and dis-

tribution of blankets, equally share and share alike, to and for their several and respective own absolute use and benefit.

1853.

In re
HOLMES.

A reference being made, upon a petition in this case, to the Master to ascertain who were the legatees specially named in the will of the testator, and the personal representatives of such as were dead, the Master found that certain persons were the legatees specially named, but he did not include in the list the brothers and sisters of *John Scatchard*, nor any of the classes or persons described but not named.

There was a residue of 1212*l.* 5*s.* 5*d.*, and, on the present petition being presented to confirm the Master's report, the question was, whether the petitioners, the persons found by the Master to be the persons *specially named*, were alone entitled to the residue, or whether the brothers and sisters of *John Scatchard*, the children of *Catherine Briggs*, and the other persons described but not named were entitled to share with them.

Mr. *E. F. Smith*, for the Petitioners. .

Mr. *Walker*, for the *Scatchards* and another class described, cited *Bromley v. Wright* (a).

Mr. *Steere*, for the trustees.

The VICE-CHANCELLOR :

No doubt the strict and accurate meaning of the terms *specially named*, is persons mentioned *nominatim*, if not by all their names, by some at least, either their christian or their surnames.

(a) 7 Hare, 334.

1853.

In re
HOLMES.

If the words had been *specially mentioned*, then the word “specially” would have meant, not expressly *named*, but mentioned as *special donees*.

In *Bromley v. Wright* the legatees were not named ; that is not *nominatim* ; yet it was held that the testator giving his residue to the legatees “before-named,” that meant before mentioned ; and that the legatees mentioned were included, though not expressly named ; that is, the word *named* was used as *mentioned*. The question in this case is, whether in the residuary clause the testator meant to include such of the legatees as he has mentioned *nominatim* ; or did he mean such of the legatees as he had before mentioned simply.

In looking at the various legacies referred to, where the legatees are not named, it is to be observed that they are legacies to classes. Now, as to some of those classes, it may be that the individuals composing them were well known to the testator ; or it may be that he did not know them all, and that it was more convenient to describe them as a class. As to the servants, the gift is first to two of his servants by name, and then “to each of my other servants who shall be in my service at the time of my decease ;” these he could not possibly name, because he could not, at the date of his will, know who would be in his service at the time of his death.

On the question, then, in what sense the testator used the words *specially named*, he has himself given the key to the interpretation of his meaning. If he meant to give his residue to those only whom he mentioned *nominatim*, why should he exclude from participating in that gift, a class of persons who are not specially named, and who yet take legacies ? [His Honor re-

ferred to the gift in trust to invest, to produce 5*l.* 12*s.* per annum to distribute blankets.] Under this clause the testator must have considered that unless he specially excluded the parties to take under it, they would take a share of the residue. He has, by expressly excluding them, himself given a clue to the interpretation, or rather a clear enunciation of the interpretation which he puts on the words *specially named*.

1853.
 —————
In re
 HOLMES.

I cannot, without disregarding what the testator has himself told us, put any other interpretation on the words than that the testator meant by them, legatees specially mentioned. I do not by this at all decide that generally the word "named," is as strong as "specially named;" but only that here the word specially, is not used for the purpose of describing those who are mentioned *nominatim*, but for the purpose of describing those legatees to whom a special benefit is given.

I see no distinction between the gift to the servants, and the gifts to the other classes described; and I am of opinion that all the legatees, whether described *nominatim* or not, excluding of course those who take under the gift for the distribution of blankets, take shares in the residue.

1853 :
17th January.

*Husband and
Wife.*

*Settlement.
Wife's Equity
for a Settlement.*

A married woman has an equity for a settlement, however small the sum.

Where a married woman was entitled to a fund of 153*l.*, her husband bankrupt, and unable to maintain her : Held, as between her and her husband's assignees, that the whole should be settled on her.

RE 10 & 11 VICT. c. 96, THE TRUSTEES
RELIEF ACT, AND KINCAID'S TRUSTS.

THIS was the petition of Mrs. *Mowat*, formerly *Caroline Kincaid*, a daughter of *Sophia Kincaid*. By a deed of the 8th February 1839, *Sophia Kincaid*, the mother of the Petitioner, declared the trusts of a policy for 500*l.* on her life, for certain payments, and subject thereto, in favour of her two daughters *Caroline* and *M. A. Kincaid*, equally, on their attaining twenty-one or marriage. The settlor died in 1851. The trustees paid into Court 307*l.* 5*s.* 11*d.* as the balance in their hands in trust for the two daughters of *Sophia Kincaid*.

Caroline, in 1845, married *Archibald Mowat*, who became bankrupt in 1851.

Mrs. *Mowat*, the Petitioner, asked for a settlement of her moiety.

There was no property besides the fund claimed ; the husband had not had any of the wife's property, and there were in fact no special circumstances except the bankruptcy of the husband, his inability to maintain his wife, and the fund being small.

Mr. *Walford*, for Mrs. *Mowat*.

It will be contended that a fund under 200*l.* cannot be settled, but must go to the husband. [He referred to Lord *Erskine's* order of 16th February 1806, *Beames'*

Orders, 464; and *Bourdillon v. Adair* (a)]. Lord *Erskine's* order does not take away the right of a married woman to her equity for a settlement; it only dispenses with the consent in Court. But if the construction were otherwise, the Court had no power to make such an order. The right existed before the order, and only an Act of Parliament could take it away. Besides, the order only applies to the case of a sum payable to a woman before she was married. Since that order, *Elworthy v. Wicksted* (b) has decided that, on the petition of husband and wife, a sum will be paid to the husband, without the wife appearing to consent; but on the express ground that the wife was presumed to have concurred. *Foden v. Finney* (c) is the other way; but the report is too meagre to be relied on. In *Re Cutler* (d) Sir *John Romilly*, M.R., overruled the latter case after great deliberation.

1853.
In re
KINCAID.

The result of these cases is, that there is no rule that a fund under 200*l.* must go to the husband; but some consent of the wife is requisite. She has a right, therefore, to *some settlement*. Then as to the quantity. To show that she might have more than one-half, he cited *Napier v. Napier* (e), *Dunkley v. Dunkley* (f).

Here the husband is a bankrupt; there are three children, and the whole sum, and that subject to costs, is 153*l.*

Mr. *J. H. Palmer*, for the assignees.

Ex parte Cutler is directly against *Foden v. Finney*,

(a) 3 Bro. C. C. 237.

(d) 14 Beav. 220.

(b) 1 Jac. & W. 69.

(e) 1 Dr. & War. 410.

(c) 4 Russ. 428.

(f) 16 Jur. 767.

1853.

In re

KINCAID.

and against the previous practice, and is therefore not binding. Lord *Erskine's* order assumes that, as to a married woman, no consent of any kind was requisite where the sum is under 200*l*. The assignees, therefore, claim the whole, unless the Court is bound by *Ex parte Cutler*. Supposing, however, the wife is entitled to *some* settlement, the assignees must have at any rate part of the fund. The mere fact of the fund being small does not authorize the whole to be taken from the assignees. There must be some more special circumstance.

Mr. *Fischer*, for the personal representatives of the donor.

The VICE-CHANCELLOR, without calling for a reply :

The first question is, whether the wife is entitled at all, the sum being under 200*l*.

There are here no special circumstances, unless the circumstances of the husband being insolvent, and the sum being very small, can be so considered. The rule of equity which entitles a married woman to have a settlement out of a fund to which at law her husband is entitled, is a rule dependent on a very different principle from the other rule, which is a rule of practice, that, if the fund is under 200*l*. the wife's consent in Court is not required. The two rules do not stand on the same footing. The rule which entitles a wife to an equity for a settlement is quite independent of the question of amount ; a woman is as much entitled to a settlement out of a small as she is out of a large fund ; while the rule which requires generally the consent of the wife in Court in order to waive her right to a settlement, is founded on this, that the Court must be satisfied that a

woman has a full knowledge of her right, before it will permit her to waive it. The Court says, where the sum is under 200*l.*, it will not require that mode of ascertaining the wife's consent. But that rule does not prevail if she chooses to insist on her right to a settlement. It does not prevent her from filing a bill, if she chooses to have a settlement. I am not aware of any rule, that if a married woman insists on her equity for a settlement, she is not to have it because the sum is under 200*l.*

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It is true there was formerly a general impression in the profession, that the two rules were correlative; that they stood on the same footing as a matter of practice. I am glad, however, that the Master of the Rolls has in the case cited caused the profession to be disabused of that impression; and whether I should have hesitated or not to do so if the point had first come before me, I have no hesitation in following the decision of the Master of the Rolls, which appears to me to rest on sound reasoning, and to hold that the smallness of the fund will not prevent the right attaching.

Then as to the quantum. In the ordinary case of there being no special circumstances, the course of the Court, not the rule,—for there is no positive rule,—is to say that the wife shall have half, and the husband or his assignees the other half. But if there are special circumstances, then a different course is adopted, and the Court will give either the whole fund, or a different proportional part. Here the special circumstance is, that the husband is in a condition to be wholly unable to support his wife. The wife and children have no other support beyond the fund, which does not exceed 153*l.* If half of that were

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to be given to the husband's assignees, and half to be settled on the wife, it would be a mere delusion, a mockery, to call that a settlement. When the husband has by reason of insolvency, no means of maintaining his wife, and there is no property, except so small a fund as this, that appears to me to be a sufficient special circumstance to justify the Court in settling the whole on the wife.

The order will in terms settle the fund on Mrs. *Mowat* for life, for her separate use ; remainder to such of her children as shall attain twenty-one, being sons, or being daughters, shall attain that age, or marry under that age, with liberty to apply on the death of Mrs. *Mowat*. That will leave a remainder in the assignees of the husband, if there shall be no child of Mrs. *Mowat* who shall take.

SWEETING v. SWEETING.

THIS was a petition by the Attorney-General, praying that the receiver in the cause might be directed to pay to the Commissioners of Inland Revenue, the sum of 425*l.* 17*s.* for legacy duty, out of the rents and profits of certain estates.

John Sweeting, by his will dated 20th November 1844, among other things gave power to his sons, when in possession of the manor and lands devised by his will, by deed appointment in writing, attested by one or more witness or witnesses, to limit and appoint to or in trust for any woman or women whom he or they should respectively marry, and that, either before or after such marriage or marriages respectively, for the life or lives of such woman or women respectively, for her or their jointure respectively, and in bar of dower, any annual sum or rent charge, not exceeding 400*l.* per annum, to be issuing out of and chargeable on any part of the said lands or hereditaments, (viz. certain lands and hereditaments devised by the will) whereof he or they should be in possession; with the usual powers and remedies for receiving the same.

The testator died shortly after making his will, leaving his eldest son and heir-at-law, *John Hankey Sweeting*, who entered into possession, under the will of his father, of certain lands devised to him for life only, with remainder to his children as he should appoint; with remainder, in default of appointment, to his children as tenants in common in tail general; with cross remainders.

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18th January.
Legacy Duty.
Statutes, Con-
struction of.
Legacy, on Con-
dition.

A testator gave to his sons certain real estates, with power to appoint to any woman they might respectively marry, a jointure in bar of dower. Held, that an appointment under this power was a gift within the 45 Geo. III. c. 28, and liable to legacy duty.

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John Hankey Sweeting married the Respondent *Amelia Augusta Sweeting*, and died, leaving her his widow, having previously by deed appointed to her for life for her jointure and in bar of dower, two annuities, amounting together to 300*l.*, free and clear of all taxes and deductions, and charged upon the lands devised to him for life with remainders over, as above mentioned. He died in 1841, without having appointed to his children, leaving children who, on his death, became entitled as tenants in common in tail. The widow enjoyed the annuity from the death of her husband, but never paid any legacy duty upon it. She was a stranger in blood to the testator *John Sweeting*.

The Attorney-General now presented his petition to have the sum of 425*l.* 17*s.*, the proper amount of legacy duty, at the rate of 10*l.* per cent., paid by the jointress.

Mr. *W. M. James*, for the Attorney-General, cited *Attorney-General v. Lord Henniker* (a), *Attorney-General v. Pickard* (b).

Mr. *Follett* and Mr. *Kinglake*, for the jointress, cited *Burridge v. Braddyl* (c), *Blower v. Morret* (d), *Heath v. Dendy* (e).

In this case there is the absence of that which would bring the case within the Acts 45 Geo. III. c. 28, and 36 Geo. III. c. 52. It is not a gift. The cases cited on the other side are cases distinguishable from this. The distinction between *Attorney-General v. Henniker* and

(a) 21 L. J., Exch. 293.

(c) 1 P. Wms. 127.

(b) 3 M. & W. 552, & 6 M. & W. 348.

(d) 2 Ves. sen. 420.

(e) 1 Russ. 543.

this case is this: here the testator himself directed the appointment to be as a jointure, and *in bar of dower*. The question is, whether such a provision contained in a will, is a *gift* when it is made in favour of a person, a stranger to the testator.

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In the 4th section of the 45 Geo. III. c. 28, the words *gift* and *given* govern the whole clause. Unless there is a *gift* it is not a legacy chargeable. Here there is no gift; there are no words expressing gift, and no subsequent acts, treating it as a gift. Indeed it is absolutely essential to the effective execution of the power, that the donee shall treat the provision not as a gift. The son could not treat it as a gift. The testator gave to the son power to purchase an immunity from dower. It is said there is no estate out of which dower could issue; and therefore there is no consideration; but the son might have other estates; besides, he was the testator's heir-at-law. The testator was therefore in effect relieving his own estate in favour of his successors. At any rate, if it is a gift at all, it is a gift for the benefit of the son, and the duty ought not to be 10*l.* per cent.

Mr. *W. M. James*, in reply.

This case does not differ from the case in the Exchequer, *Attorney-General v. Henniker*; and the only real argument on the other side is, that the decisions of the Exchequer in matters of revenue are not to be relied on. The appointment must be read as if it were in the original will. It is therefore a gift of an annuity by the testator to his son's wife *in lieu* of her dower. That, it is said, distinguishes it from Lord *Henniker's case*. But it is not a distinction; the son is merely enabled to do what, in *Henniker's case*, he actually did. But here there was no estate out of which the wife was dowable.

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Besides, the instruments were all post-nuptial and voluntary. But if the wife was a purchaser, that would only be a question what was the value of her dower. Then it is said there is a condition ; but that does not prevent legacy duty attaching. If it will, a condition to relinquish any fictitious claim might shut out legacy duty, and so the Crown could always be defeated.

The VICE-CHANCELLOR :

The question in this case arises upon the 4th section of 45 Geo. III. c. 28. Now, in order to decide this case, it must first be considered what are the cases of liability with regard to gifts of personal estate. If a testator gives a legacy out of personalty, on condition of the legatee doing some act, such as, for instance, taking the arms and name of the testator, I can have no doubt about the legacy being liable to duty ; so if a legacy were given to A., out of personal estate, on condition that he should convey an estate of his to a third party, the legacy would be liable to duty. Again, suppose this case ; of a testator having a daughter, a widow, with children, and giving her a sum of money or an annuity, out of personalty, on condition of her maintaining her children ; there can be no doubt that, notwithstanding the condition annexed, and that the daughter would thereby have imposed upon her the burthen of maintaining her children, and so would, in effect, give some pecuniary consideration in return for the legacy, still the legacy would be liable to duty. It may be a question whether, if there were a gift of a legacy out of personalty, on a condition the performance of which would cause something to be returned to the personal estate of the testator, whether there the duty would be payable on the whole legacy, or whether there would be a deduction in respect of the difference. Thus, suppose a testator were to say, I give 500*l.* to

A., he paying 100*l.* to my executor, the legacy would be substantially 400*l.*, and I suppose that amount only would be liable to duty.

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However, it appears to me, that, in all cases where a legacy or an annuity is given out of personalty on a condition, although in one sense that is a purchase of the thing conditioned to be done,—and I do not see where the line is to be drawn between one condition and another, except where something is to return to the personal estate of the testator,—in every case where a testator gives a legacy on a condition, he says in effect, “My object is to have a certain act done; if the party will consent to do it, I will give him a legacy;” and whatever the nature of the act, the testator is really purchasing something from the legatee. Now the 4th section of the Act enacts [His Honor read the clause and proceeded]. The word “give,” in this section, is applicable to both branches, and a legacy out of personal estate being on a condition, does not make it less a gift within the meaning of this section; and the same meaning must be applied to the word “give,” both as to personal estate and real estate; therefore, a gift of money out of real estate is not less a gift within the meaning of the Act, because it is upon a condition.

If the testator had given a sum of money charged on real estate to A., the wife of his son, to her separate use, on condition that she should release her right to dower out of her husband's estate, or on any other condition, that would clearly be liable to legacy duty.

If in a simple case of money charged upon real estate, and given on a condition, the money is liable to duty, then let one step more be considered: suppose a testator

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not to give directly to A., but, as in the very ordinary case, to such one or more of A.'s children as A. shall appoint; then if A. exercises his power in favour of one of the children, it is clear that that child takes under the will; that is a settled rule of the law of powers, and in that case, beyond all manner of doubt, the sum of money so appointed would be liable to legacy duty; and so if the gift were to such one or more of the children, &c., on condition that such child should do some act, that condition would not vary the case: the gift would still be under the will, and liable to duty.

Now the case before me is exactly the same in principle as the case I have supposed. The testator has created a power in the tenant for life to appoint a jointure to any wife that he may marry, but if he appoints, it is to be on condition that the wife shall release her dower; whether the dower she is to release, is her dower out of the particular estate devised, or generally, does not appear; but that is, I think, immaterial. For the reasons that I have already given, I do not see how the condition imposed by the testator, that the party taking should do a given act, varies the case from that of a testator making a direct gift on condition.

Whether the appointment may be exercised by deed or by will,—and whichever way it is actually exercised; if it is, as I think it is, established that the question turns on the original instrument, the will of the testator; that the legacy is to be treated as passing under that will,—it is immaterial whether the condition is imposed by the instrument executing the power and pointing out the donee, or by the original will creating the power.

As to the cases in the Exchequer, the only part of

those cases on which I should be at all disposed to observe, is the passages in which the language of the Court tends to create a doubt, whether if the performance of the condition involved the giving up of property, the legacy duty ought to be paid only on the difference. For the reasons I have given, I should not have thought there was any reasonable doubt on that point; there may be a doubt whether, if the condition involves the return of property to the estate itself, the full legacy duty should be paid; and possibly that is the point to which the minds of the learned Judges were adverting. In other respects, those cases appear to me to be simply carrying out a principle to its legitimate consequences; and if I had much more doubt about them than I have, I should feel almost bound to follow two decisions so fully considered.

My decision must therefore be in favour of the Crown, and the duty claimed, of 10*l.* per cent., must be paid.

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1853 :
18th January.

Will.

Construction.

What gives absolute interest.

Testator set out a schedule of his property, calling it 5000*l.* He then directed 1000*l.* to be invested in each child's name, and 1000*l.* in his wife's ; interest to them for their life, and afterwards to their *descendants*, except his wife's, which was, at his death, to be sold and divided among them, except 200*l.* to *M. L.'s* child by him. Then followed in the same paper :

"The above is increased, by

the working up of stock, to 5500*l.* I wish the same division and appropriation, except that, if any share falls in, it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters.

Held, that, by the will alone, the daughters would have taken absolute interests ; but that by the will and codicil together, they took interests which, if absolute in the first instance, were defeasible.

BIRD v. WEBSTER.

JOHN BIRD made his will in 1833 as follows :— After enumerating the items of his property, amounting to 5000*l.*, he continued, " In case I die without any other will, I wish Mr. *Webster* and Mr. *John Stacey* to ascertain the property, and to invest it in the public funds, 1000*l.* in each child's name, and 1000*l.* in my wife's ; the interest to be received by them regularly for their life, and afterwards to their *descendants*, except my wife's, which is at her death to be sold out and divided among them, except 200*l.* to *M. L.'s* child by me.—Signed, *John Bird*." On the same paper was the following codicil :—" 1834, January 14. The above is increased, by the working up of stock, to about 5500*l.* I wish the same division and appropriation, except that, as any share falls in, it may be added to the others, in case the original holder shall have no children. N.B.—The property is always meant to descend to lawful children."

The testator died in March 1834, leaving four daughters and no other children surviving. Administration was taken out by *Webster* alone. The widow died in 1852.

The petition was by two of the daughters unmarried, and the trustees of the two others, and prayed that it

might be declared that, under the circumstances, each daughter had become (subject to the legacy of 200*l.*) entitled absolutely to one-fourth of the residue, and that the one-fourth might be paid accordingly. There was no issue of either of the testator's daughters.

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Mr. *C. Barber* and Mr. *C. Hall*, for the Petitioners, cited *Attorney-General v. Bright(a)*, *Jordan v. Lowe(b)*, *Wyth v. Blackman(c)*.

Mr. *Freeling*, for the administrator, was not called upon.

The VICE-CHANCELLOR :

This will is very inartificial, though it is not ungrammatically expressed. It seems to have been framed by the testator himself, and to contemplate the probability of his making another will ; but I have seldom seen a will so inartificial in which the general intention is more apparent. The two instruments are, it must be presumed, on the same sheet of paper, for the second begins thus : "The *above* is increased," &c. They appear to have been written at some interval of time, the first being dated June 1833, the second January 1834. In the first the testator begins by setting out, in a tabular form, what is intended by him as an account of the then state of his property ; and he seems to have considered that his property amounted to 5000*l.* Then follows a statement of his having some debts, the amount of which appears to have been very small ; and then he goes on : "In case I die without any other will, I wish Mr. *Webster* and Mr. *John Stacey* to ascertain the

(a) 2 Keen, 57.

(b) 6 Beav. 351.

(c) 1 Ves. sen. 196.

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property, and to invest it in the public funds, 1000*l.* in each child's name, and 1000*l.* in my wife's." Thus far, there is no gift either of principal or interest: all that is directed is investment. Whether the testator meant that investment to be in the sole name of each child and of the wife, or whether in the names of the children jointly with that of *Webster*, and of the wife jointly with that of *Webster*, is immaterial, because it is quite apparent that I cannot draw any inference in favour of the gift of the shares absolutely from the direction to invest, for the reasons which I shall presently mention. The will then proceeds: "The interest to be received by them regularly for their life." The effect of this is to give to each child an interest for life in 1000*l.*, and to the wife an interest in 1000*l.* for her life. Then comes the expression on which the question in this case turns, "and afterwards to their descendants." Now, if the will stopped there, if there were no more, I should be bound to come to the conclusion contended for by the Petitioners; for, where there is a gift to *A.* for life, remainder to the descendants of *A.*, it is clear that, if real estate, it is an estate tail; if personal estate, it gives him the absolute interest. But this is not all in this case: the language following is, "Except my wife's, which is at her death to be sold out, and divided among *them*." So that what the testator says is, the interest of 1000*l.* is to be enjoyed by each child for life; the interest of 1000*l.* is to be enjoyed by the wife for life, and afterwards to *their* descendants; that is, to their descendants respectively, except the wife's; he excludes the wife's 1000*l.*; that, is at her death to be sold and divided among *them*. Now, it is, I understand, admitted that *them* does not mean all the persons before mentioned, but means the children, excluding the wife. Then this is to be divided among *them*, "except 200*l.* to

M. L.'s child by me." He declares, therefore, that out of the 1000*l.* which on his widow's death is divisible, a sum of 200*l.* is to go to his child by *M. L.*, and the remainder of the 1000*l.* to his four daughters.

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If the will stopped even there, I do not know how I could avoid the conclusion contended for by the Petitioners, that, as to the other sums of 1000*l.* each to the children, it would be an absolute gift to each child.

The subsequent instrument, however, which I may term a codicil, gives the testator's interpretation of what he meant to be the effect of his gifts. Having in his will adverted to the fact that his property amounted to 5000*l.*, which, if divided into fifths, gives 1000*l.* to each, that is, 1000*l.* to each child, and 1000*l.* to his wife ; he now, in his codicil, adverts to the fact that he has increased his property ; he says, " The above is increased, by the working up of stock, to about 5500*l.* I wish the same division and appropriation." Now, if the codicil stopped there, the effect would be that, instead of 5000*l.*, 5500*l.* would be divisible in fifths ; but then, in the language immediately following, the testator gives his own interpretation. He says, " Except that, as any share falls in, it may be added to the others, in case the original holder shall have no children." Now, here he introduces a variation in the division. What is the meaning of the expression, " As any share falls in, it may be added," &c., &c.? I think the testator clearly intended by it that, upon the death of either of the persons to whom life interests were given, that person's share should be added to the other shares, in case the original holder should have no children. I think the interpretation to be put on the words "original holder" is, that it does not mean any person holding, whether as original donee, or as a descendant of

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a donee, but only the first holder; then, on the death of any one of the daughters, the first holders, in case that daughter should have no children, the share of which that daughter enjoyed the interest, was to be added to the other shares, and to go and be enjoyed in the same manner as the other shares.

The testator then adds the N. B. Now, I agree with Mr. *Barber*, that in that N. B. the word "lawful" is the emphatic word. The testator, bearing in mind that he had a natural child, might contemplate, while he was making a provision for that natural child, that when making a provision for children generally, he might be supposed to intend to include natural children, and he might wish to guard against that natural inference by expressly excluding any but lawful children. But in both instruments he uses the word children. If I were obliged to decide the question, I think it probable that I should come to the conclusion, that in this will the word "children" meant to include descendants; but it is unnecessary for me to decide that point, for I think it impossible to decide that the daughters are at present entitled to more than the income for their lives. The testator has said, "that as any share falls in," which I construe as meaning, as any daughter dies, her share shall go over in case she shall have no children. Whether that means, in case she shall never have children, or whether it means, in case at the time of her death she shall have no children, or whether children means children only, or descendants, it is not necessary to decide. In either case, if at her death there shall not be the persons described in the passage referred to, her share is to go over. So that if the interpretation contended for by the Petitioners is right, and that she has an absolute interest, it would still

be liable to be defeated until the events pointed out shall have happened, which cannot be ascertained till the death. If the interpretation contended for by the Petitioners is the right one, the question does not yet arise, whether on the death of any one of the daughters, her share would go to her children or to her descendants; the only question at present is, whether in the event of there being no child, her share would not go over. I think it clear that it would, and that, even if the shares of the daughters are absolute interests, they are liable to be defeated. It appears to me that at present all that can be decided is, that the daughters do not take absolute and indefeasible interests, but are only entitled to take the income for their lives.

The Court was pressed to decide, whether, in the event of there being children, children only, or descendants would take; but declined, in the absence of parties who might claim in the character of descendants, to decide that point.

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BIRD
v.
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1853:
20th and 21st
January.

Practice.
Pleading.
Production of
Documents.
Certainty of
Allegation.

A bill alleged the Plaintiff to be entitled, under wills which it set out, as tenant in tail; it alleged that the Defendants claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure construction of these wills. The bill also alleged the Plaintiff's pedigree as tenant in tail. The answer ignored the pedigree, but admitted the possession

of documents tending to evidence that pedigree. Held, that the Plaintiff was entitled to production of them.

A bill alleged that *A.* left *B.*, his niece, and *C.*, his great nephew, his co-heirs, who thereupon became the right heirs and issue in tail of *D.* Held, that this was a sufficiently certain allegation of the title of *B. & C.*, as such co-heirs and issue in tail claiming through *A.*

WRIGHT v. VERNON.

THE bill in this case was filed by *William Wright* against *Leicester Vernon* and *Emily* his wife, and others. It alleged that *Sir Thomas Samwell*, being seised of certain real estates, by his will, dated 1st November, 1778, to the use of his son, *Thomas Samwell*, for life, remainder to his first and other sons in tail male; and, after certain limitations, to *Thomas Fuller Drought* for life, remainder to his sons successively in tail male, remainder to his (the testator's) right heirs for ever.

All the intermediate limitations became exhausted, and *Thomas F. Drought* became entitled for life, and enjoyed the estates, and died in 1843, without issue; and thereupon the right heirs of *Sir T. Samwell* became entitled.

The bill then stated a series of facts, by which it appeared that, in 1808, *Thomas F. Drought* and *Frances Ann Langham* and *Phillis Langham* were the co-heirs and co-parceners of the testator, *Sir T. Samwell*. In 1827, *Frances A. Langham* made her will, which, after divers limitations, contained an ultimate limitation to the right heirs of *Sir T. Samwell* (the father of the testator) by *Mary his second wife*.

Phillis Langham made her will at the same time, and it contained the same ultimate limitation.

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v.

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The bill then alleged facts, showing that, in 1849, all the limitations under the wills of these two ladies, preceding the ultimate limitations, had failed; and then followed this passage: "That the said limitation contained in the said wills to the right heirs of Sir *Thomas Samwell*, the father, created, as Plaintiff is advised, according to the true construction of the said wills, an estate tail to the issue of the said Sir *Thomas Samwell*, the father, by *Mary*, his second wife, and descendible as if such estate tail had descended from the said Sir *Thomas Samwell* to the issue of his second marriage."

The bill then proceeded to state the pedigree of the person through whom the plaintiff claimed; and, after stating various links of it, stated that one *Atherton Watson* died in May 1851, leaving his grand nephew, *W. L. Woodford* (one of the Defendants) and his niece *Charlotte Henrietta Wright*, the plaintiff's late wife, his co-heirs and co-parceners, who then became the right heirs and issue in tail and co-parceners of Sir *Thomas Samwell*, the father, by his wife *Mary*; and that the estates created by the wills of *F. A. Langham* and *Phillis Langham* to the right heirs and issue in tail of Sir *Thomas Samwell*, the father, by his wife *Mary*, vested in said *W. L. Woodford* and *Charlotte Henrietta Wright* accordingly; and that *Charlotte Henrietta Wright*, on the death of *Atherton Watson*, became entitled to an estate tail in possession of and in one half part of the two undivided third parts of Sir *Thomas Samwell* the testator's estate.

The bill then stated a disentailing deed, by which, in

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WRIGHT

v.

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1851, *C. H. Wright* barred her estate tail, and resettled it upon limitations, under which, in the events which happened on the death of *C. H. Wright*, which took place in November 1851, the Plaintiff, her husband, took her one-third part of the estates in fee.

The bill then went on to state that *Leicester Vernon* and his wife, and certain others of the defendants, set up an adverse claim to the estates, and pretended that on the true construction of the wills of *F. A. Langham* and *P. Langham*, an estate in fee simple was devised to the person who answered the description of the right heir of Sir *T. Samwell* at the respective times of the deaths of *F. A. Langham* and *P. Langham*, in remainder expectant upon the preceding limitations contained in their wills; and that the Defendants alleged that one *Thomas S. W. Samwell* was the person who at those times answered that description, and that he therefore then took an estate in fee.

The bill then alleged that the Defendants claimed under the will of the wife of *Thomas S. W. Samwell*, to whom he had devised his estates in fee; that the Defendants and *W. Vernon* and his wife, or their trustees, had been and were in possession of the estates claimed by the Plaintiff.

The bill then stated that, in 1851, the Plaintiff and *C. H. Wright*, his wife then living, brought ejectment against certain of the Defendants, to recover such estates; but that such action of ejectment could not be prosecuted, because the legal estate was outstanding in mortgagees; and then after various charges, there was the usual charge of books and papers.

The prayer was, to have it declared that *C. H. Wright* became, on the death of *Atherton Watson*, tenant in tail of one-third part of the estates of the testator Sir *T. Samwell*, and that, on her death, by the disentailing deed, the Plaintiff became entitled in fee, and that he might be let into possession.

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The answers of *L. Vernon* and his wife admitted the facts stated in the bill, down to the exhaustion of the limitations in the wills of *F. A. Langham* and *P. Langham*, preceding the ultimate limitations to the right heirs of Sir *T. Samwell*, the father, by his wife *Mary*; and submitted that the said limitations constituted an estate in fee simple in the person who answered the description therein contained, and denied that the limitations created an estate tail. As to the pedigree of *W. L. Woodford* and *C. H. Wright*, the answers ignored whether *Atherton Watson* did leave them his grand nephew and niece, or whether or not his co-heirs and co-parceners; and throughout it denied the title of *C. H. Wright* as tenant in tail.

The answers admitted the possession of documents set forth in a schedule, relating to the real estates mentioned in the bill.

A motion was now made for the production of the documents contained in the schedule.

The schedule referred to documents of various kinds; and, among others, to copies of a *supposed* pedigree (including the pedigree of the Plaintiff as well as of the Defendants), prepared for the use of counsel for the Defendants in previous proceedings taken by the Plaintiff and his deceased wife; fifty extracts from parish registers

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obtained by the Defendant *L. Vernon* for his defence to the action of ejectment ; and a pedigree obtained from the Herald's College, and paid for by the Defendant *L. Vernon*.

Mr. *Malins* and Mr. *Smythe*, for the Plaintiff.

The substantial question is, whether the limitations in the wills of *F. A. Langham* and *P. Langham* to the right heirs of Sir *T. Samwell* by his wife *Mary*, gave an estate tail or an estate in fee. We say it gave an estate tail ; that point, however, cannot now be argued. But the Defendants also say, we do not show our pedigree as heirs of the bodies of Sir *T. Samwell* and *Mary* his wife, and put us to proof of that. They have in their possession documents which evidence our pedigree ; and they are bound to produce them. They do not deny the links of our pedigree, they only ignore them ; but they admit the documents relate to the estates in question in the bill.

Some discussion took place as to documents, which, it was said, were privileged ; and on the Plaintiff's counsel concluding their opening of the case, the Vice-Chancellor directed the counsel for the Defendants to confine their argument to the question of producing the documents evidencing the pedigree, and the copies of the wills of Sir *T. Samwell* and of *F. A. Langham* and *P. Langham* ; the latter point, however, was given up by the Defendants.

Mr. *Campbell* and Mr. *Bagshawe*, for the Defendants *L. Vernon* and wife.

The answer ignores the title of the Plaintiff ; it could

do no more; it could not absolutely deny the pedigree alleged by the Plaintiff; for how could the Defendants know who were the ancestors of the person through whom the Plaintiff claimed? What is really asked here by the motion is information relating to, and divulging our title, which, if the Court should decide the construction in one way, viz. that it is an estate in fee, the Plaintiff has no right to at all; information as to a title, to which in that case he would be a perfect stranger, and which, though he might use it for the benefit of a third person and for our detriment, he never could use for his own benefit. The bill has been stated by the counsel's plaintiff to be, and is, a bill for equitable ejectment. If the Plaintiff were bringing ejectment at law, he must rest on his own proofs; it is clear he could not ask for the Defendants' documents. Why, then, should he now do so?

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A Plaintiff in equity, to be entitled to see the Defendant's documents on the ground of their evidencing the Plaintiff's title, must show, at least, a *prima facie* title. Here he does not do that; the title depending on the construction, and being therefore on the face of the bill uncertain. If the Plaintiff is not tenant in tail,—and whether he is or not is doubtful on the allegations of the bill itself, as founded on the documents set out,—he has no interest in the Defendants' documents; and a Plaintiff in equity must show an interest in the documents, to be entitled to their production. [They cited *Burbidge v. Robinson* (a), *Gethin v. Gale* (b), *Taylor v. Milner* (c), *Adams v. Fisher* (d), *Storey v. Lennox* (e).]

(a) 2 M'N. & Gord. 242.

(b) Cited in Amb. 354.

(c) 11 Ves. 41.

(d) 3 Myl. & Cr. 526.

(e) 1 Myl. & Cr. 525.

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Mr. *Russell* and Mr. *Renshaw*, for the trustees of Mr. and Mrs. *Vernon*.

Mr. *Malins*, in reply.

THE VICE-CHANCELLOR :

Some of the documents of which the Plaintiff seeks to have production, are deeds relating to the estates in question; and the ground on which he seeks production is, that they show the particulars of the parcels. If that were necessary for the Plaintiff to assist him in the contest, he would have a right to the production, but it will not assist him at all: the question at issue does not in the least degree depend upon the amount or particulars of the parcels; and as to those documents, therefore, the Plaintiff is not entitled to production.

Then there are copies of a *supposed* pedigree, made for the use of the counsel for the Defendants, to instruct counsel in particular proceedings; not as admission of pedigree, but made merely for the purpose of informing counsel what was the representation of the Defendants as to their own and the Plaintiff's pedigree. The Plaintiff is not entitled to these.

Then there are fifty extracts from parish registers, obtained by the Defendants, to enable them to conduct their defence in the action of ejectment, an action in which the Plaintiff was the very Plaintiff in this suit, desiring to try the question whether, on the construction of the wills of the two ladies named, the estates created by them were estates tail, or estates in fee; the Plaintiff says he is entitled if those estates were estates tail: the question is a legal question; but by reason of the legal estate being outstanding in mortgagees, it could not be tried in the action at law. The Defendants to that action

provided for their defence in it, extracts from registers, for the purpose of showing their pedigree, which is, in a great measure, the same as the Plaintiff's. The ejectment is now at an end or suspended, and those documents remain in the possession of the Defendant, and the Plaintiff asks that they should be produced. Why should they not? Why is the circumstance that they were procured for the action at law, a reason why they should not now be produced? If they had been procured for this very litigation, they must, I think, be produced. In *Story v. Lennox* the contest was, whether a policy of insurance was valid, and whether the office was bound to pay: the office resisted payment on the ground of circumstances affecting the insurer. *Lennox*, who was the party interested in the policy, and claiming payment, had had personal communications with various individuals, for the purpose of obtaining from them information relating to the insurers; that was information obtained from strangers, and for the purpose of the contest; yet he was obliged to produce the documents. [His Honor referred to the judgment in that case, and proceeded.] Here the documents in question are not confidential, but merely extracts from parish registers, and the Defendant must produce them.

Then, as to the pedigree obtained from the Herald's College, the only objection made to that is, that it was obtained at the Defendant's expense. That is not a valid objection; however the Defendant obtained it, he must show it.

Now it has been argued generally for the Defendant, that the Plaintiff ought not to be allowed inspection of documents, until he has established by a decree or order of this Court, or by the decision of a Court of law, that he

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is entitled to the estate in controversy. The Court will have, however, at the hearing to determine certain questions, the principal one of which is a question purely of the construction of wills, as to the terms of which there is no dispute: the Plaintiff says, if the construction is one way, I am entitled as the heir in tail claiming through a certain descent; if the other way, the Defendant is entitled; and it is contended, that before the Plaintiff has a right to the discovery of the documents possessed by the Defendant, to assist him in proving his descent, he must first have that which he cannot have till he has made out his descent—the determination of the question of construction. He cannot try his right at law: he is therefore obliged to come here, and his first difficulty is to make out that he is what he represents himself to be, the descendant of *A. B.* I am of opinion that as to any documents in the Defendant's custody (not being specially protected) tending to assist the Plaintiff in making out the facts requisite to prove his descent, the Plaintiff would have a right to inspect them. But then it is said that the Plaintiff has not alleged his pedigree with sufficient certainty. [His Honor referred to the passage of the bill in which the death of *Atherton Watson*, leaving his grand nephew and niece, is stated, and proceeded.] If the Plaintiff had made a mere loose statement, as that *A.* left *B.* his heir, that would not be reasonable certainty of allegation; or if he had said *A.* left *B.* his cousin and heir; that, from the generality of the word cousin, would not be a sufficiently certain allegation. But what he has done is to allege that *Atherton* left one his *niece*, and the other his *grand-nephew*; and I think those terms designate the relationship with sufficient certainty.

On the whole, I think there are a great many of the

documents which the Plaintiff is not entitled to see ; but he is entitled to see the fifty certificates and the pedigree obtained from the Herald's College.

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MURRAY v. BOGUE.

THIS was a bill by *John Murray* against *David Bogue*, to restrain piracy of the Plaintiff's book, called "A Handbook for Travellers in *Switzerland*," &c.

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9th, 10th, 11th,
13th, and 14th
December.
Copyright.
Registration.
Piracy.

The Plaintiff's bill, and the affidavit in support of it, alleged that in and previously to the year 1838, the Plaintiff wrote and composed a book under the title of "A Handbook for Travellers in *Switzerland* and the *Alps* of *Savoy* and *Piedmont*," and which work was thereafter, for the sake of brevity, called or referred to as the "Handbook," and the said "Handbook" was written and composed by the Plaintiff, principally from the personal observation and experience of the Plaintiff, obtained in the course of extensive and carefully performed journeys in and through the aforesaid countries, which had been then recently made by the Plaintiff ; and at the same time the Plaintiff, by the accounts of other travellers and authors, and comparing

The first edition of a work of compilation was published before the 5 & 6 Vict. c. 45 ; several editions of it were published after this Act, and not registered. Held, that as to so much of the matter contained in the original edition, as was contained in the subsequent ones, the owner might sue, although

those subsequent editions were not registered ; but as to the new matter, the subsequent editions were books which ought to be registered, and the owner could not sue for infringement on that point.

If a foreigner translates an English work, and then an Englishman retranslates that foreign work into English, that would be an infringement of the original copyright.

Grounds on which fairness or unfairness in the use of a previous work is to be determined.

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their accounts with the result of his own observation, was enabled to add to the said work much useful information; and in the said work the Plaintiff inserted a few communications made to him by personal friends, and which communications were written and sent to the Plaintiff, expressly to be made use of by the Plaintiff; and that previous to such publication by the Plaintiff, there existed no other work on the same plan, or containing so much and such useful information. That the Plaintiff's book, so written and composed, was first published in the month of September, 1838, and the said work had ever since enjoyed an extensive sale; and five large editions of the said work had since been published, and the second edition was printed and published in the month of July, in the year 1842; and the third edition of the said work was printed and published in the month of June, in the year 1846; and the fourth edition of the said work was printed in the month of September, in the year 1851; and the fifth edition was printed and published in the month of September, in the year 1852, and the same was, at the date of the bill, in course of sale.

That the said work of the Plaintiff was one of a series of handbooks or travellers' guides, written and composed and published by the Plaintiff, which were all printed in a uniform manner, and were bound or boarded in red cloth with gilt lettering on the outside of the upper cover of the said book; and Plaintiff's book had, from the colour of the binding, been generally known amongst foreigners as "the red book."

That the Defendant *David Bogue* some time ago announced a series of guide books under the title of "*Bogue's Guides for Travellers*," of which he had already published two parts or volumes; and the first

of such parts or volumes, with the particular title of "*Belgium and the Rhine*," was first published in or about the month of July 1852; and the second of such parts or volumes, with the particular title of "*Switzerland and Savoy*," was first published in or about the month of August 1852, with the particular title of "*Switzerland*" only, but the said title was afterwards altered to "*Switzerland and Savoy*," as the Plaintiff believed, by way of closer imitation of the Plaintiff's work; and other parts or volumes of the said series of books, called "*Bogue's Guides for Travellers*," were advertised and announced for publication; and such parts or volumes were bound in red cloth, with gilt lettering.

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That parts of the said work published by the Defendant, called "*Switzerland and Savoy*," had been pirated and copied from the "*Handbook*," and in many respects an unfair use had in the said work called "*Switzerland and Savoy*," published by the Defendant, been made of the "*Handbook*;" and in particular, in the said work called "*Switzerland and Savoy*," the design and plan of the "*Handbook*" had been followed to a very considerable extent; and the extent and nature of the piracy which had been committed would more fully appear upon inspection and comparison of the respective works. The Plaintiff in particular referred to the instances therein-after mentioned, and which, he alleged, afforded some evidence of the piratical use which had been made of the "*Handbook*," in some of which instances errors which were contained in the edition of the said "*Handbook*," previous to the fifth edition thereof, and which errors had accidentally crept into the same work, had been copied into and were also contained in the said work, called "*Switzerland and Savoy*;" and about thirty-two

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routes, in the whole, were taken from the Plaintiff's work, and piratically used in the said work, called "*Switzerland and Savoy.*"

The Plaintiff then went on to point out certain specific passages in his own book, which he alleged were copied by the Defendant; and he relied in particular on similarity in errors, and on the same objects being noticed in particular routes, to show piracy.

The substance of the evidence on behalf of the Defendant was, that being desirous of meeting the want of the public for a handbook of convenient size and moderate price, he employed one Mr. *Hunt* to write and compile for him a series of guidebooks, one of which was published in July 1852, and was the book alleged to be the piracy of the Plaintiff; that, for the express purpose of avoiding any interference with the Plaintiff, he particularly charged Mr. *Hunt* not to make any use of *Murray's* book, but to take his materials from other, and, as far as practicable, from original sources. Mr. *Hunt's* affidavits corroborated the statement of the Defendant as to the instructions given to him, and stated that he accordingly engaged Mr. *Thomas Walker*, a journalist, to write and compile such work for the said Defendant, and that he communicated to him the directions and instructions he had so received from the said Defendant, and at the same time furnished him, the said *Thomas Walker*, with his (Mr. *Hunt's*) own manuscript notes made by him during two visits he had paid to *Switzerland and Savoy.*

These manuscript notes of Mr. *Hunt* were called for by the Plaintiff's counsel, but were not forthcoming; and at a subsequent stage of the proceedings, on the

14th December, an affidavit was produced by Mr. *Hunt* and Mr. *Walker* to explain what had become of these notes (a).

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Mr. *Walker* made also an affidavit in which he stated that he did compile the Defendant's book, and that the sources of information from which he so compiled it were the said manuscript notes of Mr. *Hunt*, the manuscript notes of another gentleman of the name of *Lloyd*, several foreign books which he specifically enumerated, a book published by an American, the Rev. Dr. *Cheever*, together with many other and local publications: and then there was this passage:—"I most distinctly deny that I knowingly or willingly extracted or quoted from the said book so published as aforesaid by the said Plaintiff, any part or portion whatever." He then met several of the specific allegations of piracy, by stating as to some of them that they were taken from Dr. *Cheever's* book; as to others, that they were taken from manuscript notes, but without saying whose notes; and as to others, that they were taken from local guidebooks, but without identifying them. Some of these local guidebooks were, and others were not, produced; but none of the manuscript notes were forthcoming. What had become of them is stated in the affidavits filed on the 14th December. Many parts of the Defendant's book were confessedly translated from a German book, by one *Bedeke*, which was founded on *Murray's*.

A preliminary objection was suggested by Mr. *Craig*, for the Defendant, that the Plaintiff had not registered his book; but the Court being of opinion that the whole case should be gone into,

Mr. *Bacon* and Mr. *Renshaw*, for the Plaintiff, pro-

(a) See *post*, p. 361.

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ceeded upon the merits, and went at length into a comparison of corresponding passages in the two books. [They cited *Lewis v. Fullarton* (a), *Mawman v. Tegg* (b), *Dickens v. Lee* (c), *Bramwell v. Halcombe* (d). They cited also *Longman v. Winchester* (e), *Campbell v. Scott* (f), as to the immateriality of there being but a small quantity taken by the Defendant. On the preliminary objection they referred to the 54 Geo. III. c. 156.]

The first edition of the Plaintiff's book was published under that Act, and was duly registered, and that was sufficient. The 5 & 6 Vict. c. 45, applies only to works published *after* the Act. The subsequent editions are not new works, and do not require registration.

Mr. *Craig*, for the Defendant.

First, The Plaintiff has not sufficiently registered his book. [He referred to the 24th sect. of the 5 & 6 Vict. c. 45.] If his book is considered as published after the Act, then clearly he cannot sue, not having registered. Now the first edition was published in 1838. The second edition was published in July, 1842, which must be taken to be *subsequent* to the 1st July. The third edition was published in 1846; the fourth in September 1851, and the fifth in September 1852. Now my objections are, 1stly; As to the editions published since the statute, there is no registration; and if he proceeds under that edition, he cannot sue. As to the first edition, it was registered in the manner then prescribed by law, and in the name of *John Murray* deceased, the

(a) 2 Beav. 6.

(b) 2 Russ. 385.

(c) 8 Jur. 183.

(d) 3 Myl. & Cr. 737.

(e) 16 Ves. 269.

(f) 11 Sim. 31.

father of the Plaintiff, and not in the Plaintiff's name. Looking at the registry of the first edition, the book is entered thus : " For *J. Murray's* copy," which means his *copyright*, (54 Geo. III. c. 156, s. 5) ; in that section, title to the *copy* means to the copyright. The 8 Anne, c. 19, s. 2, also shows that this is the meaning of the word *copy* ; it is used as copyright. If, then, the registry of the first edition is a registry of copyright at all, it shows that the copyright of the book is in the representatives of *J. Murray* deceased, and it is not alleged that the present Plaintiff is such representative ; so that he has no title. But we say also, that the subsequent editions ought to be registered ; each edition is a substantive work ; it has a different title from the others. The 6th section of the present Copyright Act requires registry of every substantially *new edition*. [He referred also to the 28th section]. The bill, it must be observed, does not sue to restrain infringement of copyright in a book having the title of the original work ; and the title of the book actually alleged to be infringed, has never been registered at all.

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2ndly, Upon the merits ; no injury can be done, unless the edition of 1852 is copied ; for that is the only one having a sale, and it is not alleged that there is infringement of that edition. In a case of this kind, to justify interference, the imitation must be servile ; here it is not : *Cary v. Longman* (a), *Cary v. Kearsley* (b). [He cited also *Sweet v. Maugham* (c), *Sweet v. Cater* (d) ; and as to the question of quantity, *Spottiswoode v. Clark* (e)].

(a) 1 East, 358.

(b) 4 Espin. 168.

(c) 11 Sim. 51.

(d) 11 Sim. 572.

(e) 2 Phil. 154.

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The learned counsel then compared the several editions, to show that material additions were made in the later ones. It is said we have pirated the *plan* of the Plaintiff's book; of this there is no evidence. There is no evidence of any copying at all of the editions of 1851 or 1852. In the edition of 1851 many of the passages in our book are not to be found at all. The learned counsel then proceeded to comment in detail upon all the passages alleged to be copied. He produced also certain of the foreign guidebooks, which it was sworn on the part of the Defendant had formed the sources of his information.

Mr. *Reilly* with him.

As to the alleged similarity of plan, the Plaintiff's list of routes is 176, the Defendant's is 36. In the Plaintiff's, the subject of "*Geneva*" occupies a very small portion; in the Defendant's it occupies a very large part. The plan is in fact quite different. It is alleged that we have taken thirty-two routes from the Plaintiff, but what they are is not shown by the evidence. On the question of registration, each new edition ought to be registered. In the 24th section of the Copyright Act, the word *book* includes new editions. The second section also shows that. As to the portions of the Plaintiff's book being communications, he shows no title at all. The copyright of those is still in the authors, for the Plaintiff has not shown any assignment to him, nor any contract or payment within the Act. *Richardson v. Gilbert* (a), *Bishop of Hereford v. Griffin* (b).

[He referred also to 4 Vin. Abr. 278, Title of Books, 3rd part.]

(a) 1 Sim., N. S., 336.

(b) 16 Sim. 190.

The contributors to the Plaintiff's book have merely given him a licence to print, not a copyright. Besides, it is not shown that the first edition is the same as the third. If it is, then the title would be under the first, and that is the copyright of the Plaintiff's father; if the third edition is a materially different book, it ought to be registered.

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[The *Vice-Chancellor* having, in the course of the argument, asked for explanation as to the non-production of any of the MS. notes, from which it was alleged that the Defendant's information was taken, the affidavits of Mr. *Hunt*, and Mr. *Walker*, and of the printer, were tendered at the conclusion of the Defendant's argument.]

Mr. *Bacon* objected, that they were not then admissible.

But the *Vice-Chancellor* ruled that they might be read for the particular purpose required by the Court, of informing the Court itself.

The effect of these affidavits was as follows:—Mr. *Hunt* said he handed the MS. notes to Mr. *Walker*; Mr. *Walker* said that he used some of them in preparing the MS. which he sent to the printer, and these, when done with, he usually destroyed; and he believed he had destroyed all such; as to others, he sent them to the printer, and he believed the printer had destroyed them; and this latter statement was, though somewhat loosely, corroborated by an affidavit filed by the printer, who said he received from them the MS. papers for the Defendant's work, prepared by *Walker*; that, having a large

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quantity of copy and other paper in his possession, incumbering his premises, he sold the same as waste paper, according to his custom, and the whole of the copy of the Defendant's work was so disposed of by him.

Mr. *Bacon*, in reply.

As to the communications, there is no copyright in them in the authors. They belong to the Plaintiff. The *Bishop of Hereford's* case is on a different point; it rests upon the particular words of the clause of the Act relating to contributors to periodicals. *Richardson v. Gilbert* only shows that a contribution must be paid for to give copyright to the publisher. But this is not a question of original *authorship*; the copyright consists in the *compilation*, and includes contributions as well as original statements. The sections of the Act referred to on this point merely reserve to the authors the right to their copyright, subject to the extent to which they have parted with it, but after communicating the copy they cannot say the copyright is in them. *Rundell v. Murray* (a) shows that a gift of a work vests the copyright in the donee. The whole of the Plaintiff's book is, as a total, the result of labour, and he is entitled to the copyright in it. Then as to the registry, the copyright, which is the foundation of the bill, existed in the Plaintiff in 1838. The Act of Victoria has no application, except to books *first* published after the Act. The introductory section, in using the word *book* means to prevent the exclusion of such a thing as a sheet or a part of a book: it does not mean to include subsequent *editions*. Under the 54 Geo. III. c. 156, there was no obligation to register with reference to acquiring copyright, in the construction of that Act; as to the direction to enter the *title to*

(a) Jac. 311.

the copy, that means the right of the publisher to publish, not the title of the author: *Beckford v. Wood* (a), *Rundell v. Murray* (b). On the merits, the Defendant's case made by the last affidavit cannot be believed. [He commented on the affidavit accounting at the last moment for the destruction of the notes and MS., from which it was alleged by the compilers that the Defendants derived their information.] It is admitted that much is taken by the Defendant from Dr. *Cheever's* book, but *Cheever's* book on the face of it is copied from *Murray's*, and it is admitted that much is taken from *Badeker*, which is a free translation from *Murray's*.

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On the 13th January, The VICE-CHANCELLOR delivered the following judgment:—

This is a motion for an injunction to restrain the Defendant *Bogue* from selling, &c. [His Honor stated the terms of the notice of motion.] The Defendant insists, firstly, that, supposing his work is borrowed from the Plaintiff's, the Plaintiff is not entitled to sue in respect of the infringement, by reason of the want of due registration of his book.

Secondly, that if that objection is not to prevail, the Defendant's work is in fact no piracy of the Plaintiff's.

As to the first question, that is, the question of registration, it is necessary that I should take that into consideration first.

Previously to the recent Copyright Act, the 5 & 6 Vict. c. 45, it was not necessary, to entitle a Plaintiff, claiming as owner of copyright, to sue, that his work should be registered at Stationers' Hall. Although he

(a) 7 T. Rep. 620.

(b) *Supra*, p. 362.

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was bound to register for certain purposes, it has been decided, that where there was no registration, the party entitled to copyright might protect his right by action or suit. The 5 & 6 Vict. c. 45, made an alteration in the law in that respect. The 24th section enacts, that no proprietor of copyright in any book which shall be first published after the passing of the Act, shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of such book, pursuant to the Act. So that, as to books first published after the Act, although the author has copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of the Act, unless he has registered his book at Stationers' Hall, pursuant to the statute. That, however, applies only to books first published after the Act; it does not affect any book published before.

Now the Act passed on the 1st July 1842. The first edition of the Plaintiff's book was published in 1838, and according to the bill, and affidavits in support of it, the 2nd edition was published in July 1842. I think I am bound to assume, the Act having passed, as I mentioned, on the 1st July 1842, that the second edition was published after the passing of the Act. If it were of importance to show that the second edition was published before the 1st of July, the Plaintiff ought to have shown that to be so; he has not attempted it, and I must assume therefore that it was published after the Act.

The third was published in 1846; the fourth in 1851; and the fifth in 1852.

What, then, was the effect of the Act as to the several editions of the Plaintiff's book published after it had passed!

The Plaintiff's book, except so far as it was registered before the Act, has not been registered at all.

Now, with reference to the first edition, the law as it existed before the 5 & 6 Vict. did not require registration as a condition to the title to sue. The Act of Victoria made no alteration in the Plaintiff's rights in respect of that first edition, except in so far as it repeals all prior Acts; and if that were all, if it had stopped there, it might be a question whether there would be copyright now in any book published before the Act of Victoria, because it has been decided that there is no common-law copyright; the statute, however, goes on to re-enact copyright, giving to the author a longer enjoyment of it. But as to the obligation to register, the statute leaves that matter just where it was, in reference to existing works, and confines the new obligation to works first published after the Act.

If, then, Mr. *Murray* had published his first edition in 1838, and published no subsequent editions, and there were an infringement of that edition, he would clearly have a right now to sue at law, or in equity, to protect himself. Publishing another edition of his work, after the passing of the Act, does not affect his copyright in the first edition; but if he prints, as he has done, a second edition after the Act, not being a mere reprint of the first edition, but containing considerable and material alterations and additions, *quoad* those, it is a new work; and in order to enable him to sue in respect of any infringement of his rights in those portions of the second edition which are new, if those only were infringed he

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must, before he can sue, register the book in which they are contained. Now Mr. *Murray*, in the preface to his second and subsequent editions repeats the preface to the first, and adds this note :—"The present edition has been very carefully revised and corrected as far as possible, down to the present time; some new notes have been added, and others have been re-written." One can conceive cases in which the alterations to a second edition may be of very trifling extent; but one can also conceive cases in which a second edition may contain five or ten times the matter contained in the original. The extent, however, of the alterations is immaterial; to whatever extent a new edition is made a new work, the new part cannot be protected by suit until registration; but that effect of the Act has no operation as to the old parts; as to them the copyright is left where it was. If, then, Mr. *Bogue* has taken that which was contained in the first edition of Mr. *Murray's* work, Mr. *Murray* may protect his copyright so far, because that book was published before the Act; and this brings me to this point, that although the Defendant's argument cannot be supported to the extent to which he presses it, viz., that because Mr. *Murray* has not registered his subsequent edition, he can have no relief at all, it must be supported to this not inconsiderable extent, that I must discard all reference to any edition except the first. I must confine myself to the edition of 1838, and only look to what is contained in that; and I now come to the consideration how far Mr. *Bogue's* book is a piracy of that first edition. Now I must say, that beyond all question, in my opinion, to some extent Mr. *Bogue* has used Mr. *Murray's* book. Some instances are stated in the bill, and others were stated at the bar, to show that Mr. *Bogue* has copied the Plaintiff's errors, which

is the ordinary and familiar mode of trying the fact whether the Defendant has used the Plaintiff's book.

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Now, the use of showing the same errors in both is, that where the Defendant says he has got his information, not from the Plaintiff, but from other sources, if the evidence is unsatisfactory on the question, whether the Defendant did use the Plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original, is a strong argument to show copying. There are a great many instances of alleged imitations which have been referred to, which appear to me to be of small weight; and there are some which apply to passages and editions subsequent to the first, which I must, for the reason I have given, reject. But there are many passages in which the Defendant has used the Plaintiff's work, not probably actually making use of the first, nor even of that of 1846, but most probably the latest; that, however, is not material; and I am satisfied that, to *some* extent, the Defendant has made use of the Plaintiff's book. [The Vice-Chancellor referred to several passages confessedly taken, or abridged, from *Bædeker's* work, in which particular expressions were used not to be found in that book, but found in *Murray's*; and observed that there were many other passages, shewing that, to *some* extent, the Plaintiff's book had been used, and that that was the only use that could be made of similarity in errors. He then continued]:—

The Defendant's book is in many parts a translation of, or rather an abridgment from *Bædeker*; and this made it necessary to examine *Bædeker*, with both the Plaintiff's and Defendant's works; and I think this view must be taken. If *Bædeker's* were a translation of
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Murray's into German, and then the Defendant had retranslated *Bædeker's* into English, even if he did not know that *Bædeker's* was taken from *Murray*, I could not allow the Plaintiff's book to be thus indirectly pirated. I put that as an extreme case ; but, in that view, I consider it necessary to ascertain how far *Bædeker's* book, if published as an English work, would have been a piracy of the Plaintiff's. Now, I find that *Bædeker*, in his preface, avows distinctly the advantage he has derived from *Murray's* book. [His Honor referred to passages in the preface referring to Mr. *Murray's* book, and stating that he had made it his groundwork.] He professes to have compiled much from personal observation. I have examined, not the whole of the book, but very numerous parts of it, and I am satisfied that, though the general plan and scheme are Mr. *Murray's*, *Bædeker's* representation is a correct one, that *Murray's* is the frame, but he has filled it up in his own way ; that, taking *Murray's* for the groundwork, *Bædeker's* is substantially original.

Whether, if *Bædeker's* had been an English book, he had made an unfair use of *Murray's*, might probably be a question ; but that is not necessary for me to decide.

Now, comparing the Defendant's work with *Bædeker's*, I have found that in many parts it is a literal translation of it ; he has freely translated from *Bædeker*, and in many parts it is in fact a servile copy ; in some parts, also, he has freely taken Dr. *Cheever's* work. Now, Dr. *Cheever's* book was, no doubt, composed by a person travelling with *Murray's* book in his hand ; and some use he has made of it ; but it cannot be pretended that Dr. *Cheever's* is a piracy of *Murray's* ; in fact, Dr. *Cheever's*

work was published in *England*, but no steps have ever been taken by *Murray* against it.

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Now, I have felt great difficulty in coming to a conclusion whether, taking Mr. *Bogue's* book to have been written with a certain use of *Murray's*, and with a free use of *Bædeker's* and *Cheever's*, at the same time with much taken from other works, the use of the Plaintiff's materials and the benefit derived from his work by the Defendant, directly or indirectly, amount to such an extraction from it, as comes up to an extraction of the *vital* part; whether it comes up to an unfair use, or is only a fair use of it.

The difficulty arises partly out of the nature of the subject; two guide books referring to the same tract of country must of necessity have much that is similar; the same objects of interest are likely to be noticed by all who visit a particular place.

With regard to the general scheme of the two books, they are quite different; the Defendant's plan is much more limited than either *Murray's* or *Bædeker's*. He sets out, for instance, from *Basle*, and, traversing a given route, brings you back to *Basle*; then he takes another route, starting from *Basle*, and again brings you back. This is quite different from the scheme of routes in both *Murray* and *Bædeker*. As to the similarity between the same routes, as between any two descriptions of the same route, there must be similarity; the same important or material places must be described; but, even on that point the Defendant differs from the Plaintiff, mentioning places not mentioned by *Murray* or *Bædeker*, and omitting places mentioned by them.

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On the whole, my conclusion is, that I cannot say that the Defendant in his work makes an unfair use of the Plaintiff's. I am not absolutely satisfied that the use made of it might not by another judge be looked at in a different light; but I cannot satisfy my mind that there is that unfair use which would justify me in restraining the publication of the Defendant's work. The injunction must therefore be refused. The costs to be costs in the cause.

BETWEEN HENRY PETRE, Plaintiff, and the Honourable LAURA MARIA STAFFORD PETRE, Defendant.

1852:
8th November.
1853:
25th January.

IN this case a bill was filed by *Henry Petre*, claiming through *George Petre* the son of *George William Petre*, who was the second son of the ninth Lord *Petre* by his first marriage.

Statute of Limitations.
What Trusts are within the Statute.
Bar by Lapse of Time.

The ninth Lord *Petre* was twice married; and on his second marriage with his then intended wife, Lady *Juliana Barbara Howard*, he made a settlement by deeds of lease and release of the 14th and 15th January 1788.

A renewable leasehold for lives was vested in *A.* in trust for *B.* for life, with

remainders in the events that happened to *C.* and his heirs. Afterwards, on the marriage of *B.*, a settlement was made, (on the construction of which it was doubtful whether the leasehold passed), on *B.* for life, remainder to the sons of that marriage in tail; under which *D.* would be entitled. The lease being still subsisting in *A.*, *B.* took a renewal in his own name without noticing the trust; and after the death of *B.*, *D.* entered and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him, for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under *C.* *D.*, on his marriage, assigned the leasehold to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds.

Held, firstly, that assuming the possession of *D.*, and those claiming under him, to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement by *D.* could, as purchasers, set up the statute.

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The parties to the latter deed were *Robert Edward* the ninth Lord *Petre*, of the first part ; *George William Petre* his only younger son, of the second part ; *Juliana Barbara Howard*, the intended wife, of the third part ; the guardians of the lady, of the fourth part ; Lord *Stourton* and *John Courtenay Throckmorton* (afterwards Sir *J. C. Throckmorton*), of the fifth part ; and the Duke of *Norfolk*, Sir *Francis Molyneux*, and *Bernard Edward Howard*, of the sixth part. It recited, that the manors, messuages, lands, tenements, and hereditaments thereby granted and released, or intended so to be, were and stood limited or settled to the use of the said *Robert Edward* Lord *Petre*, and his assigns for the term of his life ; and from and immediately after his decease, to the use of the said *George William Petre*, his heirs and assigns for ever ; and upon the treaty for the said intended marriage, it was agreed by and on the part of the said *Juliana Barbara Howard*, that the sum of 5500*l.*, to which the said *Juliana Barbara Howard* was entitled, and also her shares of the sum of 4000*l.*, and the sum of 3000*l.* New South Sea Annuities, and the interest and dividends to accrue for or in respect of the same, should upon the solemnization of the said marriage become the property of and be payable and transferable to the said *Robert Edward* Lord *Petre*, for his own use and benefit ; and in consideration thereof the said *Robert Edward* Lord *Petre* and *George William Petre* did agree (among other things) to join and concur in conveying, settling, and assuring the said manors, messuages, lands, tenements, and hereditaments, with the rights, members, and appurtenances thereto belonging, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisions, declarations, and agreements in and by the said indenture limited, expressed, declared, and contained, of and concerning the same.

For these considerations, Lord *Petre* and *G. W. Petre* conveyed to Lord *Stourton* and Sir *J. C. Throckmorton* and their heirs, "all that the manor of *Selby*, in the West Riding of the county of *York*, with the rights, members, and appurtenances thereto belonging; and all those messuages, cottages, farms, lands, tenements, and hereditaments, situate, lying, and being within the manor of *Selby* aforesaid, or within the town or township, precinct or territory of *Selby*, in the said county of *York*. And, *inter alia*, all that the right of presentation, patronage, or free disposition of and to the curacy of the parish church of *Selby* aforesaid, together with all and singular the tithes, both great and small, arising, growing, renewing, or coming, and paid or payable for or in respect of any lands, tenements, or hereditaments within the said manor or the parish of *Selby*. And also the parts or shares of or to which the Right Honourable *Catharine*, late Lady Dowager *Stourton*, deceased, was seised or entitled, at the time of her decease, of and in the great and small tithes yearly issuing, arising, growing, or renewing within the parish of *Brayton*. And all and singular other the fee simple manors or lordships, or reputed manors or lordships, advowsons, rectories, tithes, rents, messuages, cottages, farms, lands, tenements, and hereditaments, which were devised or directed to be settled by the last will and testament or codicil of *Catharine*, Lady Dowager *Stourton*, or which, upon her decease, descended on the said *Robert Edward* Lord *Petre*, as her heir-at-law, situate, lying, and being, or arising, happening, or growing, increasing or renewing, or to be had, received, taken, or enjoyed, in, within, upon, or out of *Selby*, *Drayton*, *Burton*, *Thorp*, *Thorp-Willoughby*, *Roxley*, *Deepdale*, *Buckley*, *Cowseley*, *Hillam*, *Monck*, *Frystan*, *Carlton*, *Walshford*, alias *Washford*, *Wilstrop*, *Lockwith*, or elsewhere in the

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said county of *York*, (save and always except the *Craven* estates), to the use of the Duke of *Norfolk*, Sir *F. Molyneux*, and *B. E. Howard*, for a term of years; subject thereto to the use of the ninth Lord *Petre* for life; with a limitation to preserve contingent remainders; remainder, subject to a further term, to the first and other sons of the ninth Lord *Petre* by the said *J. B. Howard* in tail male, remainder to the ninth Lord *Petre* in fee.

The bill prayed that the Defendant might be declared to be a trustee for the Plaintiff and his heirs and assigns, of the leasehold hereditaments and premises in the parish of *Brayton*, and might be decreed to convey them to him with consequential directions, and accounts.

The above deed was that on which the principal question arose. The facts and the material parts of the other deeds on which the questions in this case turned, and the principal points argued on both sides, are fully noticed in the judgment.

Mr. *Malins*, Mr. *Glasse*, and Mr. *Nalder*, were for the Plaintiff. They cited *Law v. Bagwell* (a), *Commissioners, &c. v. Wybrant* (b), *Blair v. Nugent* (c), *Gough v. Bull* (d), *Young v. Waterpark* (e).

Mr. *Rolt*, Mr. *J. Bailey*, and Mr. *Messiter*, for the Defendant.

On the 25th January, 1853, The VICE-CHANCELLOR delivered the following judgment:—

(a) 4 Dru. & War. 398.

(b) 2 Jones & Lat. 182.

(c) 3 Jones & Lat. 658.

(d) 16 Sim. 323.

(e) 13 Sim. 199.

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In this case a bill was filed on the 23rd May 1850 to recover property held by the Defendant, consisting of certain leasehold premises, held under leases for lives of the prebendary of the prebend of *Wiston*. The facts are as follow :—*Catharine Lady Stourton*, the widow of the seventh Lord *Petre*, and afterwards the wife of Lord *Stourton*, died on the 31st January 1785. She was owner in fee of large estates, consisting of four portions ; certain parts were in the Isle of *Ely* ; she had estates in *Lancashire* ; the *Craven* estate ; and the *Selby* estate in *Yorkshire*. Part of the *Selby* estate consisted of the advowson of the vicarage of *Brayton* and of some lands in that parish, and of two-thirds of the great tithes. The remaining one-third of the great tithes, and one-third of the small tithes, belonged to the prebend of *Wiston* ; and the advowson, and the one-third of the great and small tithes were held by Lady *Stourton* under a lease for lives, under the prebendaries of the prebend of *Wiston*. When Lady *Stourton* made her will in 1753, she had a grandson, *Robert Edward*, the ninth Lord *Petre*, and three grand-daughters ; and her grandson had three children, *Robert Edward Petre*, his eldest son, afterwards the tenth Lord *Petre*, *George William Petre*, his second son, and *Ann Petre*.

Lady *Stourton*, being a second time a widow, made her will in 1753, and by it she directed her property in the Isle of *Ely*, and certain other property, to be settled in a given way. Nothing turns on her disposition of this portion of her property. As to her *Lancashire* and *Craven* estates, she directed them to be settled on her grandson, the ninth Lord *Petre*, for life, and after his decease, thus : “ for such one or more of his younger sons in tail male as he should by deed or will appoint ; and in default of such appointment, then to such of his sons as

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at his decease should be his second son in tail male," with remainder to such of his sons as at his decease should be his third son, and remainder to all his younger sons successively, according to seniority of age and priority of birth, in tail male. As to the *Selby* estate, of which part was renewable leasehold, she directed that to be settled in the same manner as the *Lancashire* and *Craven* estates. The *Lancashire*, *Craven*, and *Selby* estates were thus limited to the ninth Lord *Petre* for life, and after his decease, in default of appointment, to his second, third, and other younger sons successively in tail male, but with power to appoint to any younger son in tail male.

Lady *Stourton*, some years afterwards, viz. on the 10th May 1784, made a codicil to her will, and expressing her desire to extend the power of appointment given by her will to her grandson Lord *Petre*, she directed all her *Yorkshire*, *Lancashire*, and *Craven* estates, and all her leaseholds there, to be settled after his decease on such one or more of his younger sons, and such of his grandsons, or both, for such estates and on such conditions as her said grandson should by deed or will appoint. She extended, therefore, the power of appointment given to the ninth Lord *Petre*, by allowing him to appoint to any of his younger sons or grandsons, and for such estates as he should think fit.

She made other codicils, but they are not material. She died on the 31st January 1785, and the ninth Lord *Petre* proved her will and codicils. As to the leaseholds held for lives of the prebendary of *Wiston*, they consisted of one-third of the great tithes, and one-third of the small tithes, held under a lease of the 12th March 1784, by which they were granted and leased to her and her heirs for the lives of herself and *Robert Edward*

Petre, afterwards the tenth Lord *Petre*, and *G. W. Petre*, and the life of the longest liver of them. When Lady *Stourton* died, her life had to be replaced; the other two lives, *R. E. Petre*, the tenth lord, and *G. W. Petre*, being still subsisting.

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On the 15th April 1785, the ninth Lord *Petre*, Lady *Stourton's* heir and executor, took a renewed lease from the then prebendary of *Wiston*, to him his heirs and assigns, for the lives of himself and his two sons *Edward Robert*, afterwards the tenth Lord *Petre*, and *G. W. Petre*. In August 1785, *G. W. Petre*, being then in his twentieth year, married *Mary Howard*, and articles of agreement were entered into, dated the 1st August 1785, whereby the ninth Lord *Petre* and *G. W. Petre* contracted with trustees (of whom one was *J. C. Throckmorton* afterwards Sir *J. C. Throckmorton*,) that, if the marriage should take effect, and he, *G. W. Petre*, should attain twenty-one, then the ninth Lord *Petre* and *G. W. Petre* would, within three years from the date of the articles, settle and assign messuages, lands, and hereditaments, part of the estates devised by the will of Lady *Stourton*, of the yearly value of 1000*l.*, for the benefit of *G. W. Petre* and *Mary Howard* and their issue, as mentioned in the articles. On the 10th January 1787, *G. W. Petre* attained twenty-one, and then the covenant had to be performed; and by a deed poll, dated the 20th July 1787, the ninth Lord *Petre* exercised his power under Lady *Stourton's* will as to the *Lancashire* estates only, by appointing them, after his decease, to the use of *G. W. Petre* and the heirs male of his body, with divers remainders over similar to those mentioned in the will and third codicil of Lady *Stourton*. And by a bargain and sale dated the 23rd July 1787, being, in fact, part of the same transaction, Lord *Petre*

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and *G. W. Petre* conveyed the *Lancashire* estates to the tenant to the *præcipe* for suffering a recovery, to enure to the use of the ninth Lord *Petre*, the appointee in fee. On the 18th of August 1787, a recovery was accordingly duly suffered.

In the following January 1788, the ninth Lord *Petre* having lost his first wife was about to marry a second time; and on that marriage a series of deeds was executed, and on those deeds, or on some of them, the Plaintiff founds his title. They must, therefore, be examined with some degree of minuteness.

The first of these deeds were indentures of lease and release, dated the 9th and 10th January 1788. The deed of the 10th January 1788 was made between the ninth Lord *Petre* of the first part; *Robert Eduard Petre*, his eldest son, afterwards the tenth Lord *Petre*, of the second part; *G. W. Petre* of the third part; Lord *Waldegrave* of the fourth part; and Lord *Stourton* and Sir *J. C. Throckmorton* of the fifth part. (Sir *J. C. Throckmorton* was also one of the trustees of the marriage articles of 1785, executed on the marriage of *G. W. Petre*). This deed recites the will and third codicil of Lady *Stourton*, her death, &c.; it recited her title to the church and tithes of *Brayton* under the lease from the prebendary of *Wiston*, the renewed lease to the ninth Lord *Petre*, of the 15th April 1785, the deed-poll of the 20th July 1787, the bargain and sale of the 23rd July 1787, and the recovery. And then the *testatum* was as to the *Lancashire*, *Craven*, and *Selby* estates, to Lord *Waldegrave* and his heirs, to the following uses:—As to the *Selby* and *Craven* estates which were in *Yorkshire*, subject to a term, to the use of the ninth Lord *Petre* for life, with remainder to Lord *Waldegrave* to preserve contingent remainders,

remainder to the use of such one or more of the sons of the ninth Lord *Petre*, or such one or more of his grandsons, or both, or such of his younger sons and such of his grandsons, and for such estates and upon such conditions as he should appoint by deed or will; and subject thereto, to such other of the uses in the will and codicils of Lady *Stourton* as were subsisting. And as to the *Lancashire* estates (subject to the term), to the use of the ninth Lord *Petre* in fee. This deed, so far as relates to the four estates of Lady *Stourton*, in effect followed mainly the directions of her will, the only deviation from the limitations in that will being in respect of the *Lancashire* estates. As to those, instead of declaring the uses according to the directions of Lady *Stourton's* will, it declares them according to the bargain and sale and recovery of 1787. Besides the fee simple estates, the deed of the 10th January 1788 deals also with the prebendal leaseholds, and those it limits to the use of Lord *Waldegrave*, his heirs and assigns, in trust "for such person and persons as by virtue of or under the limitations thereinbefore contained should for the time being be entitled to the manors and other the fee simple hereditaments thereinbefore granted and released, situate and being in the county of *York*, to the end and intent that the said leasehold premises might go and be held and enjoyed with the same fee simple hereditaments so far as the nature of the different estates, &c., would permit."

And I may here mention, that not only is the leasehold property the subject of a distinct operative part in this deed, but the subject of a separate lease for a year.

The next of the series of deeds executed in 1788 is a deed-poll of the 11th January 1788, endorsed on the

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deed of the 10th; and by that deed-poll the ninth Lord *Petre* executes his power of appointment by appointing the *Yorkshire* estates comprised in the deed of the 10th, to the use of *G. W. Petre*, his heirs and assigns; and then he appoints that Lord *Waldegrave* shall hold the remainder and reversion expectant upon the death of him, the ninth Lord *Petre* in the church and tithes, and other leasehold premises for lives granted by the deed of the 10th, in trust for *G. W. Petre*, his heirs and assigns; and on that deed the Plaintiff founds his right. These deeds vested the beneficial interest in the property comprised in them on the ninth Lord *Petre* for life, with remainder to *G. W. Petre*, Lord *Waldegrave* being the trustee.

The next of the series of deeds of 1788 (material to the present case) are a lease and release of the 14th and 15th January 1788; and these deeds carry into effect the covenant entered into by the ninth Lord *Petre* and *G. W. Petre* on the marriage of *G. W. Petre*. Next comes the most material of the series, dated also the 14th and 15th January 1788, a settlement by lease and release, on the second marriage of the ninth Lord *Petre* with Lady *Juliana B. Howard*, an infant of the age of eighteen. By this settlement *G. W. Petre*, who, subject to his father's life estate, was the owner in fee of the *Selby* estate, joined with his father in settling it to the use of trustees for a term of years for raising pin-money, and subject thereto to the use of the ninth Lord *Petre* for life, remainder to Lord *Stourton* and Sir *J. C. Throckmorton*, to support contingent remainders, and after limitations to provide for a jointure, and for provisions for the children, remainder to the use of the first and other sons successively of the ninth Lord *Petre* by his said intended wife, in tail male, with an ultimate limitation

to the ninth Lord *Petre* in fee. With respect to this deed the Plaintiff's contention is, that though *G. W. Petre* did join with his father in conveying the *Selby* estate, he did not convey his interest in the *leasehold* property, the one-third of the great tithes, and the one-third of the small tithes comprised in the prebendal leases, but that those leasehold premises remained as previously settled.

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Before considering the effect of that deed, I will pass on in the narrative of the circumstances.—On the 22nd October 1797 *G. W. Petre* died intestate, leaving several children, of whom *G. Petre* was the eldest, and *H. Petre*, the Plaintiff, was the second son. *G. Petre* was an infant of the age of twelve, and on the death of *G. W. Petre* the remainder in fee in the *Craven* estates descended to *G. Petre*, and of course if *G. W. Petre* had not parted with the leasehold property, that also descended on *G. Petre* as his heir. Now *G. W. Petre* being one of the lives in the prebendal lease of the 15th April 1785, on his death it was necessary to renew, and then this took place. The lease was vested in Lord *Waldegrave* as trustee; but the ninth Lord *Petre* overlooking that, himself took a renewed lease in December 1798, by which the church and tithes and premises in the parish of *Brayton* were leased to him, the ninth Lord *Petre*, his heirs and assigns, for the lives of himself, *R. E. Petre*, and *Edward R. Petre*. It is material to observe this, because if the ninth Lord *Petre* had considered that *G. Petre*, the son of *G. W. Petre*, was the person entitled, the probability is that he would have inserted the life of *G. Petre*, instead of inserting, as he did, the life of his own infant son by his second marriage. At this time the prebendal lease of April 1785 was still in existence, in Lord *Waldegrave*. The grant of this renewed lease of course did not put an end to the previously existing lease; and if the mistake had been

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discovered at the time, the Court would have set it right. But the new lease being granted to the ninth Lord *Petre*, while there was a subsisting lease remaining in Lord *Waldegrave*, had this effect, that there were at law two concurrent leases.

On the 2nd July 1801, the ninth Lord *Petre* died; and this is a material date, because on his death the remainder, which vested in *G. Petre*, as the Plaintiff contends, became an estate in possession. The ninth Lord *Petre* left a widow and issue by his first and second marriages. By the first, *R. E. Petre* and *Ann Catharine Petre*, and the children of his deceased son; of the second marriage, three children, *E. R. Petre*, through whom the Defendant claims, and two daughters; *E. R. Petre* was then seven years old. The ninth Lord *Petre* by his will and codicils, appointed his widow, Lady *Juliana Barbara*, guardian of his son *E. R. Petre*. On the death of the ninth Lord *Petre*, *E. R. Petre* entered into possession (by his guardian) of the rents of the *Selby* estate, and also of the church and tithes of *Brayton*. That entry, according to the Plaintiff's contention, was unlawful.

The next transaction is this: the ninth Lord *Petre* having been one of the lives, the tenth Lord *Petre* takes a renewed lease dated the 29th January 1802, of the tithes, &c., to himself, for the lives of himself and *E. R. Petre* and his own infant son, afterwards the eleventh Lord *Petre*. He does not put in the life of *G. Petre*, who, according to the Plaintiff, was the person entitled, but that of his own infant son. Then by a deed of the 10th June 1803, endorsed on the renewed lease, and made between the tenth Lord *Petre* of the one part, and Lord *Stourton* and Sir *J. C. Throckmorton* of the other part, it was witnessed, that the said

tenth Lord *Petre* conveyed to Lord *Stourton* and Sir *I. C. Throckmorton*, the hereditaments and premises comprised in and demised by the indenture of lease of the 29th January 1802, to such uses, upon such trusts, and for such ends, intents, and purposes, and under and subject to such powers, provisos, conditions, charges, payments, limitations, declarations, and agreements as limited, expressed, and declared or directed, and contained concerning the same, in the said indenture of release of the 15th day of January 1788. Now the Plaintiff contends that no uses of this leasehold property were declared, because he says the property was not included in it. However, at any rate, the parties who executed the deed declared that the leaseholds should be held upon the trusts of the settlement.

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The next circumstance to be referred to occurs on the 30th July 1807, when *G. Petre*, under whom the Plaintiff claims, attained twenty-one; and if the Plaintiff is right, he was then, at any rate, under no disability. On the 29th March 1809, the tenth Lord *Petre* died. On the 13th July 1810, a renewed lease was taken from the Prebendary of *Wistow*, to Lord *Stourton* and Sir *I. C. Throckmorton*, for the lives of *E. R. Petre*, *W. H. F. Petre*, and *Charles H. Howard*. Here, again, the life of a stranger was put in instead of the life of *G. Petre*, which would scarcely be expected if *G. Petre* was the person whom the parties then considered entitled; and it is to be observed, that the expense of these deeds and of the renewal fines was paid by the Dowager Lady *Petre* as guardian of her son *E. R. Petre*, and out of money belonging to his estate; and in order to preserve the character of personalty to these monies, a deed was executed on the 14th July 1810 between Lord *Stourton* and Sir *I. C. Throckmorton*, of

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the one part, and *Juliana Barbara Dowager Lady Petre*, of the other part. This deed recites that, under the settlement of the 15th June 1788, *E. R. Petre* was entitled to the rents and profits of the leasehold hereditaments comprised in the indenture of lease of the 29th January 1802; and it witnesses that Lord *Stourton* and Sir *I. C. Throckmorton* declared and agreed to and with the said *Juliana Barbara Lady Petre*, her executors, administrators, and assigns, that they, Lord *Stourton* and Sir *I. C. Throckmorton*, and the survivor, and the heirs of the survivor, would stand seised of and interested in the said leasehold hereditaments and premises comprised in the said last-mentioned indenture of lease (viz. the lease of 13th July 1810), with their appurtenances, upon trust from and out of the rents, issues, and profits thereof, or by mortgage or sale of the same, or any part thereof, during the time to come, &c., to levy and raise the sum of 737*l.* 2*s.* 8*d.* thereinbefore mentioned to have been paid for the renewal of the lastly thereinbefore recited indenture of lease, and the costs, charges, &c., with interest, and to pay the same to the said *Juliana Barbara Dowager Lady Petre*, her executors, administrators, or assigns, and subject to such payment upon the trusts limited, &c., of and concerning the said hereditaments and premises, (together with others), in and by the said indenture of settlement of the 15th January 1788; so that this deed recites actually, that under the settlement of 1788, *E. R. Petre* was entitled to the leaseholds.

So matters continued till the 28th of September 1815, when *E. R. Petre* attained twenty-one. Up to that period he had been by his guardian in possession since the death of Lord *Petre*, and he remained in possession till 1848; in November 1815 he suffered a recovery. In July 1829 *E. R. Petre* married the defendant, and by inden-

tures of the 17th and 18th July 1829, reciting, amongst other things, that *E. R. Petre* was seised of an estate in fee simple in possession, of all the manors and other hereditaments thereafter particularly mentioned, except certain parts thereof, being part of the hereditaments in *Drayton* aforesaid, mentioned in the schedule thereunder written, which were held by the said *E. R. Petre* under a lease for lives under the prebend of the prebendary of *Wistow*, in the cathedral church of *York*, the said *E. R. Petre* did convey and assure to *W. H. F. Lord Petre* and the Earl of *Surrey* and their heirs, certain fee simple manors, estates, and premises therein mentioned and described, being of very much greater annual value than 2000*l.*, to hold the same unto the said *W. H. F. Lord Petre* and Earl of *Surrey* and their heirs for ever. Nevertheless, to the use of said *E. R. Petre* and his heirs until the solemnization of the said then intended marriage, and from and after the solemnization thereof, to the use of *Henry Valentine Stafford Jerningham* and *Charles E. Jerningham*, their executors, administrators, and assigns, for the term of 99 years, upon certain trusts for raising and paying the annual sum of 500*l.* by way of pin-money to the said Defendant *Laura Maria Stafford Petre*; and subject thereto to the use of said *E. R. Petre* and his assigns, for his life, with remainder to the use of said *William Henry Francis Lord Petre*, and Earl of *Surrey*, and their heirs, during the life of said *E. R. Petre*, upon trust to support the contingent remainders thereafter limited, with remainder, to the use, intent, and purpose that said Defendant *L. M. S. Petre*, in case she should survive said *E. R. Petre*, should yearly receive for her life one annual sum or yearly rent charge of 2000*l.*, issuing and payable out of all the said hereditaments and premises thereinbefore granted and released, such yearly rent

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charge to be in full for her jointure, and in bar of dower, freebench, or thirds at common-law or by custom, and subject thereto to the use of *Philip Augustus Hanrott* and *John Wright*, for the term of 500 years, for securing the payment of such rent charge, with remainder to the use of the first and every other son of the body of said *E. R. Petre* on the body of said Defendant *L. M. S. Petre* to be begotten, severally and successively in tail male, with remainder to the use of the said *E. R. Petre*, his heirs and assigns for ever. And by the said now stating indenture of release and settlement it is further witnessed, that for the considerations therein mentioned, said *E. R. Petre* did grant, bargain, sell, and release unto said *W. H. F. Lord Petre* and Earl of *Surrey*, and their heirs, all the messuages, lands, and other hereditaments particularly mentioned in the schedule thereunder written, which were held by said *E. R. Petre* by virtue of any lease or leases for lives, under said prebendary of the prebend of *Wistow*, and all the appurtenances thereof, to hold the same unto and to the use of *W. H. F. Lord Petre* and Earl of *Surrey*, and their heirs and assigns, for the lives of the persons for whose lives the premises were then held, and for the lives and life of the survivors and survivor of them, subject to the payment of the rent, and performance of the covenants reserved and contained in the leases thereof, upon the trusts thereafter declared concerning the same, viz., upon trust out of the rents and profits thereof, or by way of mortgage, to raise sufficient money to pay the fines, fees, and expenses of renewing the existing or any future leases of said hereditaments. And it was by the said now stating indenture of release and settlement declared that the said trustees, and the survivor of them, and the heirs of such survivor, should stand possessed of the said leaseholds, hereditaments and pre-

mises, upon such trusts and to and for such intents and purposes, as would nearest correspond with the uses and trusts thereinbefore declared concerning the said manors, estates, and hereditaments so thereby granted and released as aforesaid.

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There was no issue of the marriage, and therefore the intermediate limitations are immaterial. By the same deed, *E. R. Petre* granted all the messuages in the schedule, held by virtue of any leases. By this settlement, then, of 1829, the property comprised in it was, for valuable consideration, that is, the consideration of marriage, conveyed to Lord *Petre* and Lord *Surrey*, in trust for the benefit of himself and his wife, &c.

From that time *E. R. Petre* remained in undisturbed possession down to the time of his death; and by his will he devised his real and personal estate to his wife, the Defendant.

It is admitted by the Defendant, that what was done subsequently does not affect the question, the Defendant claiming under the devise of her husband, *E. R. Petre*.

The bill was filed on the 23rd May 1850, and the Plaintiff by that bill insists, that by the effect of the marriage settlement of 1788, he is entitled in fee to the leases for lives. The interest in remainder of *G. Petre*, fell into possession in 1801; and the Plaintiff claims as the heir of *G. Petre* who died without issue.

Now the first question is, whether the leasehold property was included in the settlement of 1788. If it was, then there is an end of the Plaintiff's case. That

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question must of course be tried by reference to the words of the deed itself. The Plaintiff's contention is this. He says: there are no words in the deed of 1788, sufficient to pass the leaseholds. I am not now considering whether it was the *intention* of the parties that they should pass, but whether they did pass; whether the words of the deed are sufficient to pass the leasehold. The Plaintiff, to show that they are not, says, that in the deed of the 10th January 1788, which did pass the leasehold, there is not only a separate operative part but a separate lease for a year, applicable to the leaseholds. It is clear that in that deed there was enough to pass the leaseholds. But is it equally clear that there are not in the deed of the 15th, words sufficient of themselves to pass the leaseholds? It must be considered what was the nature of the property; the leases use words which would carry any hereditament; but did the property in fact consist of anything but tithes? To ascertain this I have resorted to the two Enclosure Acts, the 36 Geo. III. c. 76, and the 39 Geo. III. [His Honor referred to them to show that in them the property was treated as tithes, and proceeded.] And in some of the deeds the leaseholds are spoken of as *tithes*; and I conclude, that in the leasehold property nothing but tithes was comprised. If that is so, now let us refer to the words of the settlement of the 15th January, 1788. [His Honor referred to the description of the parcels comprising the *Selby* estate, and to the words "and also the parts or shares," &c., (p. 373).] Then after describing other portions of property, come the words, "all and singular other the fee simple manors or lordships, &c., tithes, rents," &c., whatsoever, devised by the will of Lady *Stourton* (p. 373). Now what were the parts and shares which Lady *Stourton* had? She held in fee two-thirds of the great tithes, and under leases,

one-third of the great tithes, and one-third of the small tithes. As to the words used, they are in themselves sufficient; besides, Lady *Stourton* held no part of the small tithes in fee simple; she had no estate except leasehold in any such tithes. If the case then stood merely on the words, there are words enough; I am now only on the dry point on which the Plaintiff's case is based, that there are no words in the settlement capable of comprising the property in question.

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But although the words in themselves are enough, still, after the words to which I have referred, come the general words, "all and singular, other the fee simple, manors," &c. Now, it is a fair argument for the Plaintiff to say, on the question whether the parties *intended* the leasehold to pass, that it was not so intended, because though the words first used may be large enough, they must be restricted by the subsequent words. I must also give the Plaintiff the benefit of this argument. He says the deed of settlement, in stating the parcels, states them in the same manner as in the deed of the 10th January 1788. Now by the description in that deed, he argues, it was not considered by the parties that the leaseholds passed, because if it had been so considered, they would not have introduced as they did a separate operative part to pass the leaseholds; no doubt that is a good argument on the question of *intention*, though not on the question whether there are words *per se* of sufficient force. If then the question between the parties turned on that dry question, I think there are sufficient words to pass the leaseholds; but *non constat* that the deed did *actually* pass them. To ascertain that, it must be seen what, on consideration of the whole, was the *intention*. Now if I look to the intention, if it stood on the deed alone, it would be

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doubtful whether it was the intention of the parties to pass the leaseholds. The winding-up by saying, "all other the fee simple manors," &c., leads rather to the inference that the intention was only to pass fee simple property.

But then passing to the next question, do I find from all that took place from and including the time of the execution of the deed of 1788 to the present time, any indication of the *intention* of the parties? Of course I could not construe the deed itself by matter *dehors* the deed; but the question of intention has a material bearing on another view, to which I shall have presently to refer. Now I find the *Selby* estate, the fee simple property clearly intended to pass by the settlement of 1788, comprised certain fee simple lands in the parish of *Brayton*, subject to tithes, and comprised two-thirds of the great tithes. Now it is contrary to probability that when the parties were settling this estate, consisting of land and tithes, they should not intend to make the two go together. [His Honor referred also to the deed of 10th January 1788]. That deed conveyed the tithes and other hereditaments and premises comprised in the lease of the 15th April 1785 to Lord *Waldegrave*, in trust for such person and persons as by virtue of or under the limitations thereinbefore comprised, should be entitled to the fee simple estate, thereby conveyed. And then followed these words, "to the intent that the said leasehold premises might go and be held and enjoyed with the same fee simple hereditaments, so far as the nature" &c. Though that is not conclusive as to the intention, it is on the whole evident that, in the deed of the 10th January the parties did mean that the leaseholds should go with the *Selby* estates. Again, the ninth Lord *Petre*, when he took a renewed lease, would naturally have put in the

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life of the person entitled after his own death, and his putting in the life of his infant son by his second marriage, affords an inference that he considered the leasehold property would go to that infant son. Add to this what, in my mind, is almost conclusive, viz. the whole course of conduct. On the death of the ninth Lord *Petre*, it is not *G. Petre* who enters into possession, but *E. R. Petre*, by his guardian; that assumes that all the parties then supposed that *E. R. Petre* was entitled. Again, in the renewed lease taken by the tenth Lord *Petre*, he puts in the life, not of *G. Petre* but of his own infant son. Then in the transactions of 1802 and 1803, the deed of the 10th January 1803 assumes that the trusts of the settlement of 1788 comprised the leasehold property, and the fee and fines in the renewed lease of 1802 were paid by the Dowager Lady *Petre*, as the guardian of *E. R. Petre*. The deed of the 14th July 1810 contains an express recital that *E. R. Petre* was, under and by virtue of the trusts and limitations contained in the settlement of 1788, entitled to the rents, issues, and profits of the leasehold hereditaments and premises comprised in the indenture of lease of 29th January 1802. And *E. R. Petre* on his marriage settles the *Selby* estates, including the leaseholds. But then, in addition, there is this: the professional gentleman who is alleged by the Plaintiff to have been the solicitor by whom the whole series of deeds of 1788 was prepared, and the whole arrangement carried into effect, was the solicitor of the *Petre* family; he knew what the intention of the parties was; and unless I attribute fraud to him I must assume that he considered not only that the parties intended in the settlement of 1788 to comprise the leaseholds, but that they were so included.

To meet this, the Plaintiff suggests a conspiracy to

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defraud *G. Petre* by purposely concealing from him the deeds relating to the property; and the parties so charged with fraud are not only *Mr. Pearson* the solicitor, but the Dowager Lady *Petre*, the tenth Lord *Petre*, Lord *Surrey*, Sir *I. Throckmorton*, and of course *E. R. Petre*; nor is the ninth Lord *Petre* exempted entirely from the charge. At present, on this part of the subject, I will only say that I think the whole allegation of fraud is a pure and entire fiction.

The conclusion to which I come thus far is, that on the question of *intention*, (not looking at it for the purpose of *construing* the deed,) I do not feel any doubt that the parties intended the leasehold property to pass with the *Selby* estate. As to the question on the construction of the settlement of 1788, whether the words in it are sufficient to pass the leaseholds, I think there are words sufficient; but whether the leaseholds *did* actually pass, I have some doubt; I incline to think they did, and if they did, there is an end of the question. But even on the assumption that the settlement did not pass them, I think the Statute of Limitations is a bar.

For the purpose of considering the effect of the Statute of Limitations, I shall assume that on the death of the ninth Lord *Petre*, the party entitled was *G. Petre*, the then infant son of *G. W. Petre*, and that the entry of *E. R. Petre* by his guardian was a wrongful entry. The estate which the Plaintiff claims through *G. W. Petre*, is the estate which was vested in remainder in *G. W. Petre*, expectant on the death of the ninth Lord *Petre*; the Plaintiff admits that the Statute of Limitations is a bar to his claim, unless the case falls within the 25th or 26th sections affecting express trusts or concealed fraud.

The first question is, whether it is within the 25th section. [His Honor read the 25th section of the 3 & 4 Will. IV. cap. 27.] and proceeded. In order to determine the question under that section, it is necessary carefully to consider its terms. Now the expression "claiming through him," occurs three times in the section, and has in each place the same meaning: it means "deriving title," and that is in accordance with the first, the interpretation clause. The 25th section is also confined to *express* trusts; that is, trusts expressly declared by a deed, or a will, or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be *expressly* appointed by some written instrument; and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute; But, if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be the right owner; that is the construction that I put on the 25th section of the statute. The section is confined to the case of a bill being filed by the *cestuis que trust* against express trustees, or those claiming under them; that is, to suits in which the contest is between those two parties; and it has no application where the contest is as to a right between the *cestuis que trust* and third persons, not being express trustees. If that were not so, what would be the meaning, in the 25th section, of the words "to bring a suit against the trustee?" &c. The statute is to apply

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where the contest is between the *cestui que trust* and the person alleged to be an express trustee; not to the case where the trustee may be a *constructive* trustee, but is not an *express* trustee. Now I will assume that on the death of the ninth lord *Petre*, *G. Petre* was entitled to enter as *cestui que trust*, the legal estate being in lord *Waldegrave* as *express* trustee; the ninth Lord *Petre* not being an *express* trustee for anybody, took the lease of the 18th December, 1798. Now I may assume that if a bill had then been filed by *G. Petre*, the Court would have declared that the ninth Lord *Petre* was a trustee for him; he was in fact a constructive trustee, assuming that *G. Petre* was entitled beneficially. When he died, the tenth Lord *Petre*, acting on the lease of 1798, takes a renewal, the lease in Lord *Waldegrave* still subsisting, the legal estate being still in him as a trustee on *express* trusts. The tenth Lord *Petre* was not declared a trustee by any instrument; and by the deed of June 1803, he assigns the lease to trustees for the persons entitled under the trusts of the settlement of 1788; that is the only *express* trust declared by the deed of 1803; and if, as the Plaintiffs say, there were no trusts of that leasehold property in the settlement of 1788, then there was no *express* trust of them in the deed of the 10th June 1803.

In 1810, the fines and expenses on taking the renewed lease of the 13th of that month, were paid by the guardian of *E. R. Petre* out of his monies; and by the deed of the 14th July, reciting the lease of the 13th, there was an express declaration of trust of the leasehold premises, for such trusts, &c., as were limited, expressed and declared of and concerning the said hereditaments and premises, in and by the then recited indenture of release and settlement of the 15th

January 1788; that is, an express trust for *E. R. Petre*, who was tenant in tail under that settlement. Now, was the ninth Lord *Petre* an express trustee for the Plaintiff? Was the tenth Lord *Petre* such trustee? Were Lord *Stourton* and Sir *I. C. Throckmorton*, the trustees of the deeds of the 11th and 14th July 1810, express trustees for the Plaintiff? But supposing they could have been considered as express trustees, how could *E. R. Petre* be treated as a trustee at all for *G. Petre*? In the contest between the present Plaintiff claiming under *G. Petre*, and *E. R. Petre*, or those claiming under him, there is clearly no case of express trust.

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There are several cases on the subject of the statute, but they are all cases of charges on land (except *Salter v. Cavanagh*, in 1 Dru. & Wal. 668,) or of legacies, within the 40th section, or of annuities. But I may refer to what fell from Lord *St. Leonards*, in *Law v. Bagwell*, in 4 Dru. & War. 398. He says:—"The 25th section of the late Statute of Limitations, providing for express trusts, renders lapse of time unimportant in all cases within the section, *that is between the cestui que trust and his trustee*, unless the trust is disturbed, and that disturbance can only be effected by such a denial of the trusts as takes place when the trustee sells to a third party for valuable consideration, the property held by him in trust." [His Honor referred also to the case of *Commissioners of Charitable Donations v. Wybrant* (a) and continued]:—That case does not apply, neither do *Ward v. Arch* (b), nor *Goff v. Bull* (c). *Francis v. Grover*, in 5 Hare, 39, was a case of an annuity. In the case of *Young v. Lord Waterpark*, reported in 13

(a) 2 Jones & Lat. 182.

(b) 12 Sim. 472.

(c) 16 Sim. 323.

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Sim. 199, and 6 Jurist, 656, and in 10 Jurist, 1, on appeal, the facts are not fully reported in Simons, but they are very fully stated in the 6 Jurist. [His Honor stated the facts of that case, and continued.] When that case was cited from the report in 18 Simons, to Lord *St. Leonards* in *Chappell v. Rees (a)*, his Lordship's observation was this: that it did not appear, from the report of the case in Simons, whether the relation of trustee and *cestui que trust* subsisted between the party having the estate and the person entitled to the money; but he presumed such was the case, as the Vice-Chancellor said, &c. That case came on on appeal before Lord *Lyndhurst (b)*, and he referred to the 40th section of the Act, but did not mention the 25th. He says:—"In this case the term for 500 years is still in the trustees, and there is nothing therefore contained in the statute to prevent them from raising the residue of the 10,000*l.* in the manner directed by the settlement; and the money when so raised would be held by them as trustees for the purposes of the settlement, *i.e.* for the use and benefit of the parties entitled under the settlement; and therefore, as to the two-seventh shares, for the use and benefit of the Plaintiff, the personal representative of two of the younger children. To a case like the present, between a trustee and *cestui que trust*, the statute of William IV. has no application. The trustee did not hold adversely to the *cestuis que trust*, but for them and for their use and benefit." I refer to the case of *Young v. Lord Waterpark*, on account of the observations of Lord *St. Leonards*, made in reference to it as it stood in the report cited to him from 18 Simons; but in his Lordship's Essay on the new statutes, he refers to it at pp. 41 and 105; in the latter

(a) 16 Jur. 417.

(b) 10 Jur. 1.

page he says :—" In the case of portions secured by a term of years, for example, where they have not been raised within the time of limitation under the 40th section, yet if the term which secures them is not barred, the trustees are not prevented from raising the portions, and when raised, they will hold the money as trustees for the children. In such a case, between trustee and *cestuis que trust* the statute has no application. The trustees do not hold adversely to the *cestuis que trust*, but for their benefit."

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There are several other cases which have been cited, but I abstain from commenting upon them, as I do not think they apply.

I am of opinion, on the whole, on this part of the case, that it does not fall within the 25th section of the statute.

Next, supposing that I was of opinion that the statute does apply, still the right to file a bill accrues at the time at which the land shall have been conveyed to a purchaser: sect. 25. Now, in 1829, *E. R. Petre* being in possession, conveyed for valuable consideration his estates, expressly including the leaseholds in question, to trustees to certain uses. There was, therefore, more than twenty years before the bill was filed, a conveyance to a purchaser. If, therefore, it had been even a case of *express* trust, the statute would not apply.

Then, does this case come within the 26th section? Firstly, what is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the

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circumstances giving that right, and by means of such concealment enables himself to enter and hold. The Plaintiff shows by his bill that he knows what is meant in the statute by concealed fraud, for he alleges a conspiracy, in which all the persons I have named, in before alluding to this part of the case, must have been parties. I confess I can see no ground even suggested for concluding there was any such conspiracy or fraud, except the single fact that *E. R. Petre* entered, and that all parties have acted on the assumption that he was the person entitled. [The Vice-Chancellor went in some detail through all the circumstances of the case, with reference to the question whether any fraud could be imputed, and concluded that there had been no concealment; that there was no ground for supposing that all the material transactions had not, or at least might not, with reasonable diligence, have been known to the Plaintiff or those through whom he claimed; and unless that conclusion could be arrived at, his Honor was of opinion that the 26th section of the statute did not apply. His Honor then continued:]—I am of opinion, on the whole, 'hat the statute is a bar to the Plaintiff's claim. But if there were no question of the statute, if I was proceeding on the ordinary principles applied to cases of adverse enjoyment, consider the date of the transactions. The original deed on which the Plaintiff founds his claim, was executed so far back as 1788, sixty-two years before the bill was filed. Every person concerned in the various transactions who could explain the intention of the parties to them, is dead. If such a bill as this had been filed while some of them were living, and a counter bill had been filed by the ninth Lord *Petre*, or by *E. R. Petre*, asking the Court to rectify the settlement of 1788, can I now conclude that the latter bill would have been unsuccessful? Can I, after sixty-two years have

elapsed, and on the materials before me, conclude that the Court would *not* have directed the settlement to be rectified so as to include the leasehold property! Must I not rather come to an opposite conclusion, if I could come to any?

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Another view which has been justly pointed out by the counsel for the Plaintiff is, that there is great reason to conclude, as to the appointments made by the ninth Lord *Petre*, that they might have been set aside as frauds upon his power. Suppose now that immediately after the death of the ninth Lord *Petre*, such a bill as this had been filed, the Plaintiff insisting on his title; and suppose *E. R. Petre* had filed a bill to rectify the settlement, insisting that the appointments were void. If the Court had come to the conclusion that the appointments were a fraud on the power, who would have been entitled? Why, all these estates would have gone to *E. R. Petre*, the person against whose right this bill is filed. There would be, at this distance of time, as much ground for setting aside the appointments made by the ninth Lord *Petre*, as for supporting the claim of this bill; and I can no more now disturb the rights of the parties, so far as they exist under one set of the deeds, than I can set them up so far as they would appear to exist under the other. I am of opinion, therefore, that on all these grounds, even if the Statute of Limitations did not apply, the bill must be dismissed with costs.

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31st January.

*Chancery Im-
provement Act.
Practice.
Allowance of
Income pending
a Suit.*

A married woman, having a life interest to her separate use in real estate, with her husband cut timber.

A suit was instituted in one branch of the Court to carry into effect the trusts of the settlement. In another branch a suit was in existence, in which a claim was made on the married woman's separate use, in respect of the timber cut.

Held, that, in the first suit, the Court could not decide the question as to the right to cut the timber; but the married woman, securing the

value of the timber cut, was allowed her income pending the suit.

STACEY v. SOUTHEY.

THIS was a suit to carry into effect the trusts of a settlement. A motion was made asking, among other things, under the 57th section of the Chancery Improvement Act, for payment to the Plaintiff, pending the suit, of the income of property limited to her separate use for her life. It was alleged that there was a liability, on the part of the Plaintiff and her husband, to the trust estate, in respect of timber cut by the Plaintiff and her husband, before the institution of this suit. It appeared in this suit that there was another suit at the Rolls, in which it was sought to charge the Plaintiff's separate income for the timber cut. There was no evidence of the value of the timber cut. The total income of the Plaintiff was about 180*l.* a-year.

Mr. *Shebbears*, for the motion.

Mr. *Prendergast*, for the trustee of the estate, opposed it.

The VICE-CHANCELLOR said, under the 57th section of the Act, he could not decide on the validity of the claim for timber. But if the value of the timber could be ascertained, the amount being brought into Court or otherwise secured; the remainder of the income might be paid to the Plaintiff, without prejudice to any proceedings in the other suit at the Rolls against such income.

RE RANDALL'S WILL, AND THE TRUSTEE
ACT, 1850.

1853:
17th February.

Trustee Act,
1850.

Construction.

IN this case the Master, by his report and certificate of the 28th October, found that two persons, *Lyder* and *Daniell*, were jointly trustees under a certain indenture of August 1826, of a sum of Long Annuities, standing in the joint names of *Lyder*, *Daniell*, and another deceased, and that *Lyder* and *Daniell* were such trustees for the applicants; and that it was uncertain whether *Lyder* was living or dead; and that he was a trustee within the Trustee Act. And he certified that the *cestuis que trust*, the applicants, were entitled to an order directing the proper officer of the bank to transfer, or join with *Daniell* in transferring the stock into the names of *A.*, *B.*, and *C.*, to be held by them on the trusts of the deed of August 1826. Upon this certificate an order was made, vesting the right to transfer the stock in *Daniell* alone, and directing him to transfer to *A.*, *B.*, and *C.* Before the order could be completed *Daniell* died, and a motion was now made, on proof of *Daniell's* death, under the 22nd section of the Trustee Act, 1850, for an order that the bank should transfer the fund into the names of *A.*, *B.*, and *C.*, on the assumption that, by the death of *Daniell*, *Lyder* was, under the Master's finding, sole trustee, and it was uncertain whether he was living or dead.

A. and *B.*, being trustees, the Master found that it was uncertain whether *A.* was living or dead: but *B.* was living; afterwards *B.* died. Held, that *A.* was not sole trustee within the Trustee Act, 1850; and the 22nd section of the Act did not apply.

On the 22nd of February, the VICE-CHANCELLOR said, it appeared to him, upon careful consideration of the Act, that he could not strain the construction so as to make it apply to the case in its existing state. [His Honor re-

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In re

RANDALL.

ferred to facts stated, and added :]—The object is, that I should proceed on the footing that *Lyder* is living, and a sole trustee. Now the term “sole trustee” in the Act, has a clear and definite meaning ; it means a person originally a sole trustee, or one who has become sole trustee by surviving. As the matter now stands I cannot predicate that of *Lyder*, as it appears by the Master’s certificate, that, at least some time ago, it was uncertain whether he was living or dead. I think that the case is not within the Act.

1853 :

10th and 11th

February.

*Inclosure Acts,
Construction of
Jurisdiction.
Commissioners
of Inclosure.*

Under the 8 & 9 Vict. c. 118, the Inclosure Commissioners had made a provisional order, and were proceeding to make their final award. It was disputed whether the lands intended to be inclosed by them were within the Act.

Held, that equity would not interfere to restrain them by injunction from proceeding.

TURNER v. BLAMIRE.

THE bill in this case was by *Montague John Turner*, on behalf of himself and the other persons entitled under the will of *William Turner*. After stating the title, (which was not disputed) the bill stated, that “the *Woodcote* estate (which was part of the testator’s estate), with the two rights of sheep walk over the adjoining lands, was duly conveyed to the testator in or about the year 1818, by the then owner, the late *George Durant*, Esq. (then commonly called Captain *Durant* and afterwards Colonel *Durant*), since deceased, and had been in the possession of the said *George Durant* for thirty years and upwards, prior to the conveyance to the testator, and is described in certain title deeds relating to the estate as, and is considered to be, an ancient manor or reputed manor. No part of the estate is or has been, at any time within the period of sixty years and upwards, before the 24th day of May 1851, or, as the Plaintiff believes, has ever been, subject

to any rights of common whatsoever, or to any gated or stinted pastures, or held, occupied, or used in common during any time or season, or periodically, or for any purposes or limited purpose; nor is the property, or right of or to the vesture or herbage of any part thereof, nor has it been, at any time within the said period, nor, as the Plaintiff believes, has it ever been, during the whole or any part of the year; nor of or to the wood or underwood thereof, growing thereon, separated from the property of the soil thereof; nor does any part of the said estate consist, nor has it at any time within the said period, nor, as the Plaintiff believes ever, consisted of lot, meadow, or other lands, the occupation or enjoyment of separate lots or parcels of which is or has been, at any time within the said period, subject to interchange among respective owners in any known course or rotation, or otherwise."

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"By an Act of Parliament passed in the session of the 13th year of her present Majesty, chapter 8, and which was passed without the knowledge, consent, or sanction of, and without notice to the Plaintiff and the other persons beneficially interested in the *Woodcote* estate, under the will of *William Turner*, authority was given to the Inclosure Commissioners for *England* and *Wales* to proceed with the inclosure of certain lands in the parish of *Carshalton* and hamlet of *Wallington*, in the county of *Surrey*, subject to the provisions of the general Inclosure Acts then in force, and *John Nash*, of *Reigate*, in the county of *Surrey*, was duly chosen and appointed valuer, to divide, set out, and allot the lands subject to be inclosed. Part of the lands of the *Woodcote* estate are uninclosed, but no part of them is subject to be inclosed, or otherwise dealt with under the special or any general Inclosure Act, without the consent in writing of

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the persons legally and beneficially entitled thereto or interested therein."

" A claim was duly delivered to the valuer, on or about the 24th day of May 1851, on behalf of the Plaintiff and others legally and beneficially entitled to or interested in the *Woodcote* estate and premises, under the will of *William Turner* deceased in respect of the two several rights of sheep walk over the lands proposed to be inclosed by the Act of the 13th of her Majesty, chapter 8; but no application or consent in writing or otherwise, under the special or any general Inclosure Acts or otherwise, has ever been made or given by or on behalf of the Plaintiff or any other person or persons legally entitled to or beneficially interested in the *Woodcote* estate, under the will of *William Turner* deceased, to the Commissioners, Assistant-Commissioner, or valuer, or any other person or persons whomsoever, for the purpose of shortening or rendering straight any boundary fences between the land to be inclosed, and any adjoining lands of the *Woodcote* estate; or to set out or determine the boundaries between the land to be inclosed and such adjoining land; or to draw or define any new line of boundary; or to exchange any part of the *Woodcote* estate for any other land in the same or any adjoining parish; or to direct any part of the lands of the *Woodcote* estate to be converted into or used as a regulated pasture, to be stocked or depastured in common by any other persons; or to direct any inquiries whether any proposed change of any part of the *Woodcote* estate, not subject to the said Acts or any of them, would be beneficial for the owners thereof; or to direct any inquiry whether any division or allotment of any of the lands of the *Woodcote* estate, lying intermixed with lands belonging to other persons, or divided into inconvenient parcels, would be beneficial to the respective owners."

"The Plaintiff, and others of the persons beneficially interested in the *Woodcote* estate, have on several occasions dissented in writing from, and personally by their agents protested against, any interference or dealing with the lands of the *Woodcote* estate by the Commissioners, Assistant-Commissioner, or valuer; but notwithstanding their dissent and protests, the valuer, by himself or his agents, has entered upon lands of the *Woodcote* estate, for other purposes than those of surveying, valuing, or otherwise dealing with lands subject to be inclosed thereunder, and without the consent or permission of the Plaintiff, or any of the persons legally or beneficially interested therein, sunk and erected certain posts and poles thereon, and altered, enlarged, and diverted a certain bridle-road, of the width of three or four feet, running through part of the *Woodcote* estate, through an ornamental plantation thereon, and for that purpose cutting down several trees on the plantation, and converting the former bridle-road into a new road of the width of thirty or forty feet, or thereabouts; and the valuer has in like manner, and without the consent or permission of the Plaintiff or any of the persons legally entitled to or beneficially interested in the *Woodcote* estate, begun to alter, straighten, widen, and divert another road, on and running through part of the *Woodcote* estate; and has purported to allot certain of the lands of the *Woodcote* estate, not subject to be inclosed, to the owners of adjoining lands, and given certificates of his allotments to them; and has purported to set out, divide, and allot for inclosure a considerable part of the *Woodcote* estate; and has drawn up a report in writing, with a map thereunto annexed, purporting to specify all the claims allowed, and all the allotments, exchanges, and partitions made in the matter of the inclosure, and the roads, ways, and works set out and directed to be made by him, and to contain

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all such particulars in relation to such allotments (including allotments of the *Woodcote* estate not subject to be allotted or inclosed), ways, and roads, and works, as by the said Acts directed, and other directions and determinations thereof purported to be authorized for the purposes of the inclosure; and has signed the report and sent the same with the map to the office of the Commissioners, as by the said report and map will appear."

"The Commissioners have approved of, or intend forthwith to approve, of the valuer's report; and the valuer, under the direction of the Commissioners, has drawn up, engrossed, and signed, or intends forthwith to draw up, engross, and sign, the award in the matter of the inclosure, containing his report, or intends to annex to the engrossment the map referred to by his report; and the Commissioners threaten and intend to confirm the award under their hands and seal, unless restrained by the order and injunction of this honourable Court."

"The Defendants, *William Blamire*, *George Darby*, and *Henry Charles Mules* are the Inclosure Commissioners for *England* and *Wales*, duly appointed."

The bill then suggested, that if the report and award of the valuer were respectively approved and confirmed by the Commissioners, such confirmation would be conclusive evidence that all the directions in the Act in relation to such award, and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, had been obeyed and performed, and no such award could thereafter be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto, or on account of any want of any no-

tices or consent required by the said Acts, or on account of defects or omissions in any previous proceeding whatever, in the matter of the inclosure, and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid would be binding and conclusive on all persons whomsoever.

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The prayer was, that it might be declared that no part of the *Woodcote* estate, late in the possession and occupation of *William Turner* deceased, and included in the report of the valuer, was subject to be inclosed under the *Carshalton* and *Wallington* inclosure award, without the consent of the Plaintiff and the other persons beneficially interested in the *Woodcote* estate, under the will of their grandfather *William Turner* deceased.

That the Defendants, *William Blamire*, *George Darby*, and *Henry Charles Mules*, might be restrained by the order and injunction of the Court from confirming the award of *John Nash*, the valuer in the matter of the *Carshalton* and *Wallington* Inclosure Act, so far as it purported to affect such of the lands of the *Woodcote* estate included in the report of the valuer as were not subject to be inclosed without the consent in writing of the Plaintiff and other persons beneficially interested therein or legally entitled thereto, under the will of *William Turner* deceased.

On the question of fact, whether the land in question had been subject to rights of common, &c., within the allegations of the bill, there was much and conflicting evidence. Besides the question of fact, the Defendants, the Inclosure Commissioners, denied the jurisdiction of the Court to stay the proceedings at all. They relied for this, first, on the 1st section of the 13 Vict. cap. 8;

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which they said directed the inclosure commenced to go on, and the Court could not stop that. The section of the 13 Vict. cap. 8, in question, was as follows:—
 “Whereas the Inclosure Commissioners for *England* and *Wales* have, in pursuance of an Act passed in the ninth year of the reign of her Majesty, intituled, ‘An Act,’ &c., (the Inclosure Act, 8 & 9 Vict. cap. 118,) issued provisional orders for and concerning the several proposed inclosures mentioned in the schedule to this Act, and have in the annual general report of their proceedings certified their opinion that such inclosures would be expedient, but the same cannot be proceeded with without the authority of Parliament: be it enacted, that the said several proposed inclosures mentioned in the schedule to this Act be proceeded with.” The schedule to the Act included the *Carshalton* and *Wallington* inclosure viz., the land in question. The Defendants relied also on the general Inclosure Act of the 8 & 9 Vict. c. 118. They referred for this purpose to the following sections: the 24th, 25th, 26th, 27th, 33rd, 34th, 46th, 47th, 104th, and 105th.

For the Plaintiffs, Mr. *Glasse*, Mr. *Phinn*, Mr. *Tindal Atkinson* and Mr. *Villiers*.

Mr. *Bacon* and Mr. *Fleming*, for the Defendants.

It has been decided that the provisional order of the Commissioners is the subject of appeal to a court of common law. [They cited on this point an unreported case, *Wheeler v. Bishop of Winchester**, and referred to the 56th and 57th sections of 8 & 9 Vict. c. 118.] In April 1849, the Assistant-Commissioner made his report: that

* The Reporter has been unable to obtain any further information as to this case.

was followed by the provisional order. There was full notice of the intention to inclose; the Commissioners made their report, and the Legislature has sanctioned the whole transaction by the special Act, the 13 Vict. They argued that the 56th section gave ample appeal without coming to this Court.

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They relied also on the special Act, the 13 Vict., to show that the Commissioners must go on, and might be compelled to do so by *mandamus*; so that it could not be contended that this Court would interfere to stop them.

Mr. Glasse, in reply.

On the 12th of February, the VICE-CHANCELLOR delivered his judgment, which, so far as regarded the question of jurisdiction, was as follows:—The injunction that is asked by this motion is an injunction to restrain the Defendants, who are the Inclosure Commissioners of *England* and *Wales*, from confirming the award of Mr. *John Nash*, the valuer in the matter of the *Carshalton* and *Wallington* inclosures, so far as it purports to affect such of the lands of the *Woodcote* estate as are not subject to be inclosed without the consent of the Plaintiffs and the other persons beneficially interested therein, or legally entitled thereto, under the will of *William Turner* deceased; so that the notice of motion of course assumes, that if the award of Mr. *Nash* the valuer is affirmed, it will affect some lands in part of the *Woodcote* estate, which are not subject to be inclosed without the consent in writing of the Plaintiffs and the other persons interested. And although the notice of motion does not, any more than I believe the bill does, point out the specific pieces of land which are alleged to be portions of the *Woodcote* estate, which ought not to be inclosed

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without the consent in writing of the parties; although the form of the notice of motion does not, and I believe the bill does not, point out the specific lands to be taken, at the bar they are pointed out by reference to a map, which, as I understand it, has been framed on the part of the Plaintiffs. It is alleged that one of the pieces of land in that map, marked B, is land belonging to the *Woodcote* estate, which is not within the power of the Inclosure Commissioners, and ought not to be allotted at all.

Now, the ground upon which I am asked to interfere appears to me to be this: that inasmuch as the Inclosure Commissioners have no right to inclose anything but what is open or common; if they are proceeding to inclose or allot anything that is not open and common land, they are going beyond the powers of their Act, and this Court has jurisdiction to interfere. Now, if that be the foundation on which this Court would interfere, the effect is, that the Court of Chancery is the Court for the inclosure of all the common lands of *England*. That must be the effect of it; because, whenever the Inclosure Commissioners are proceeding under the powers given them by the general Act, assisted, if necessary, in certain cases, by a special Act, to determine if certain lands are proper to be inclosed, any parties saying, "You, the Commissioners, are wrong in your view: there is an acre, or five acres, or ten acres of land which you are mistaken about," may file a bill in the Court of Chancery, to have it determined by the Court of Chancery, whether the Commissioners are right or not. In other words, the Commissioners have no jurisdiction (for that is the effect of it), no jurisdiction even primarily to determine what are open or common lands; what are lands subject to be inclosed under the powers of the Act.

Now it is impossible to look at the sections referred to of the Act without coming to this conclusion at least, that the Inclosure Commissioners are, as they are directed to do by the 25th section, to hold a preliminary meeting to inquire into the expediency of inclosing lands when those lands are fixed upon by them as proper to be inclosed. They are then to proceed to consider what is suggested to them, and the Assistant-Commissioner, who is the person to hold this preliminary meeting, is to report whether the inclosure should take place. It is quite clear, that although the Assistant-Commissioner may be liable to be controlled in the exercise of his judgment, he is at least the person in the first instance to determine what lands are to be inclosed ; and when he has determined what lands are to be inclosed, and when the general Commissioners upon his report make a provisional order directing the inclosure to proceed, or stating that by reason of their being within fifteen miles of *London* there must be a special Act, and that they shall report to Parliament accordingly, I say the decision of the Assistant-Commissioner or the general Commissioners, as the case may be, is either final and conclusive, or else an appeal is given by the Act of Parliament. And the Act of Parliament expressly gives an appeal from any decision whatever, whether it be the Assistant-Commissioner or the general Commissioners, to a Court of law, in a certain mode pointed out by one of the sections of the Act. I quite feel this, that this Court has jurisdiction over the Commissioners. Unquestionably it has never been disputed that this Court has jurisdiction over them ; but jurisdiction in what cases ? This sort of case might arise ; I am not, of course, using it as applicable to these particular gentlemen who are the Inclosure Commissioners. But I can conceive a case where Commissioners for a given purpose might be pro-

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ceeding in such a way as that the parties were precluded by their mode of proceeding from exercising their right of appeal. Supposing they had so proceeded, or were about so to proceed, that the parties who ought to have a right of appeal should be excluded from the exercise of that right—that is an instance in which, unquestionably, this Court would interfere to prevent any such injustice being done. But this Court surely is not the Court to sit to determine whether a particular acre of land in each particular case that is questioned before the Commissioners, or whether a particular field of five acres or ten acres, is or is not proper to be inclosed by the Commissioners. My own opinion is, that if that were so, this Court would have nothing but bills appealing from the decision of every Assistant-Commissioner throughout *England* and *Wales*, upon these inclosures. I wish it to be clearly understood that I am far from repudiating the jurisdiction of this Court over Inclosure Commissioners, any more than other Commissioners. We know that bills have been frequently filed, and this Court has exercised its jurisdiction over the Lords Commissioners of her Majesty's Treasury. There was a case of *Ellis v. Earl Grey (a)*, in which this Court entertained jurisdiction over the Lords Commissioners of the Treasury. And there has been a case of a bill filed against the Commissioners for the Adjudication of French Claims, in which the Court interfered with respect to those Commissioners. But it is not to interfere with them in the legitimate exercise of those discretions and that authority which are conferred upon them by the Act; and clearly, one of the preliminary jurisdictions given to the Commissioners of Inclosure is to exercise their discretion and judgment in the first place, whether lands which are sug-

gested to them as proper to be inclosed are or are not fit and proper to be inclosed, and of a quality capable of being inclosed. But their being supposed to err in that conclusion does not authorise a party to come here to appeal from that act to the Court. The course of proceeding is, that if the Assistant-Commissioners be wrong, the party may appeal to the general Commissioners, the chief Commissioners, I may call them ; or he may appeal direct from the Assistant-Commissioners, as well as from the general Commissioners, to a Court of law, by a speedy process, and have the matter determined in a way in which questions of that sort are best determined, by a feigned issue, which is to go to a jury, in which the jury are to have witnesses examined before them, and are to determine upon the facts which are in controversy. It appears to me that the Plaintiff is not entitled to the injunction which he asks, on this first ground, that he has not shown to me that there is any case here existing which justifies this Court in exercising a jurisdiction to prevent the Commissioners from proceeding in the regular way.

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1853 :
22nd February.

Practice.
Production of
Documents.

The 18th section of the Chancery Amendment Act does not entitle a Plaintiff to read an affidavit on a motion to produce documents, to establish the possession of documents not specifically admitted by the answer to be in the Defendant's possession.

LAMB *v.* ORTON.

IN this case, on a motion for production of documents on the answer, the Plaintiff tendered an affidavit, to show the probability of the Defendant having in his possession a document ; the answer referring generally to documents, but not admitting specifically the possession of this particular document. The plaintiff relied on the 18th section of the Chancery Amendment Act.

Mr. *Bagshawe*, for the motion.

Mr. *Bazalgette*, *contrà*.

The Court ruled that the affidavit could not be read ; that the production must be obtained on the admissions of the answer only. On the language of the 18th section of the Act, the Vice-Chancellor observed, that it was almost *verbatim* the same as the language of the clause in a common decree for an account, where the parties are directed to produce deeds, &c. That in the construction of that clause, producing on oath has always been held to mean the Defendant's oath ; the Defendant is put to his oath to state how far he admits the possession of documents ; it does not mean the oath of anybody, but only that of the party required to produce the documents.

Between JOHN EVANS, JOHN PUGH, and THOMAS JONES, Plaintiffs,

AND

THOMAS JONES SAUNDERS and SAMUEL JONES EVANS, Defendants.

1853 :
27th, 28th, 29th,
and 31st January.

*Powers,
Exhaustion of.*

THIS was a special case. The statements were as follow :—

By indentures of lease and release dated the 15th and 16th March 1793, the release between *Anne Evans*, the testatrix after named, formerly *Anne Lewis*, the only child of *Stephen Lewis* deceased, by *Elizabeth* his former wife, also deceased, of the first part ; *Anne Lewis*, of the second part ; *David Griffiths* and *William Davies*, of the third part ; and *John Tucker* and *William Rogers*, of the fourth part. After reciting that the said *Stephen Lewis* had then lately died intestate, seised for an estate in fee simple of and in the several messuages, tenements, lands, and hereditaments thereafter mentioned and described, and that the same on his decease descended to and became vested in his daughter, the said testatrix *Anne Evans* (and which said messuages, tenements, lands, and hereditaments included a messuage or tenement, farm, and lands called *Nanticroy*, being the estate in question), it was (by the indenture now in statement) witnessed that the said testatrix *Anne Evans* granted and released to the said *David Griffiths* and *William Davies*, their heirs and assigns, all that one equal

A. had a general power of appointment by deed or will. She made an appointment by deed, reserving power to revoke and to make any new appointment by deed. She repeated this process twice, and then by a deed-poll she revoked the preceding appointment, but made no new appointment. Afterwards, by will she purported to appoint on trust to sell. Held, that the first deed exhausted and destroyed the original power ; and no new appointment being made by the deed-poll, and no new power

of appointment by will having been reserved, there was no power to appoint by will, and the appointment on trust to sell was bad.

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undivided moiety or half part of all and singular the several messuages, tenements, lands, and hereditaments thereafter mentioned and described, with their appurtenances, to hold the same to the said *David Griffiths* and *William Davies* and their heirs (subject as therein mentioned), to the use of the said *John Tucker* and *William Rogers*, their executors, administrators, and assigns, for the term of 200 years; and subject thereto and to the trusts thereof, to the use of the said *Anne Lewis* and her assigns, for her life, and after her decease to the only proper use and behoof of the said testatrix *Anne Evans*, her heirs and assigns for ever. (Then followed the trusts of the term, which, for the purpose of the decision in this case, are immaterial.)

By indentures of lease and release, bearing date the 18th and 19th April 1794, the release between *Mary Evans*, widow and relict of *James Evans*, clerk, deceased, of the first part; *John Evans*, eldest son of the said *James Evans* deceased, by the said *Mary Evans*, of the second part; the said testatrix *Anne Evans*, by her then name and description of *Anne Lewis*, spinster, only child and heiress-at-law of the said *Stephen Lewis*, of the third part; *William Rogers* and *David Griffiths*, of the fourth part; and the said *John Tucker*, Esq., and *Thomas Evans*, of the fifth part. In consideration of a marriage then intended, and shortly afterwards had and solemnized, between the said *John Evans* and the said testatrix *Anne Evans*, the messuages, tenements, lands, and hereditaments mentioned and described in the hereinbefore-stated indenture of the 16th March 1793, and which included the said messuage, or tenement, farm, and lands called *Nantycroy*, were by the indenture now in statement limited and assured to the said *William Rogers* and *David Griffiths*, their heirs and assigns, (subject, as to one un-

divided moiety or half part thereof) to the estate for life limited to the said *Anne Lewis*, the widow, by the said indenture of release of the 16th March 1793, therein recited, and to the said term of 200 years thereby created, &c., to the use of the said testatrix *Anne Evans*, her heirs and assigns, until the solemnization of the said intended marriage; and after the solemnization thereof, to certain uses in the indenture now in statement mentioned, which have determined or failed of taking effect; with remainder to the use of the said *John Evans* (since deceased) and his assigns for his life; with remainder to the use of the said testatrix *Anne Evans* for her life; with remainder to the use of the said *William Rogers* and *David Griffiths* and their heirs, during the lives of the said *John Evans* and the said testatrix *Anne Evans*, his then intended wife, and the life of the survivor of them, in trust to support contingent remainders; with remainder to the use of the said *John Tucker* and *Thomas Evans*, their executors and administrators, for a term of 500 years, and subject thereto, with remainder to the use of the sons of the marriage in tail successively; with remainder to the use of daughters of the marriage in tail, as tenants in common, with cross remainders between them; with remainder to the use of such person and persons, for such estate and estates, interest and interests, to take effect at such time or times, in such manner and form as the said testatrix *Anne Evans*, notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing or writings in the nature of a will, or by any codicil or codicils to be by her signed, sealed, and published in the presence of three or more credible witnesses, should from time to time, and as often as she should

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think fit, devise, direct, limit, or appoint; and in default of such devise, direction, limitation, or appointment, and subject thereto, to the use of Anne Lewis, widow and relict of the said Stephen Lewis (since deceased), for her life, with remainder to the use of the second son of Thomas Saunders, with remainders over as therein mentioned. Then followed the trusts of the term of 500 years, which are not material. The intended marriage between John Evans and Anne Lewis was duly solemnized, and John Evans, the late husband of the testatrix Anne Evans, died on or about the 7th June 1821, in the lifetime of the testatrix Anne Evans, intestate and without issue.

By an indenture of appointment dated 5th June 1830, and made between the testatrix *Anne Evans*, of the one part, and the Rev. *William Davies* and *Lewis Evans* of the other part, after reciting the indentures of the 18th and 19th April 1794, and that the testatrix *Anne Evans* was desirous and had determined to exercise her said power of appointment in such manner as was thereafter expressed, subject to the power of revocation and new appointment thereafter contained, it was (by the indenture now in statement) witnessed, that the said testatrix *Anne Evans*, in pursuance of and in exercise and execution of the power or authority, powers or authorities given, limited, or reserved to her in or by virtue or means of the said thereinbefore in part recited indenture of the 19th April 1794, and also by virtue and in exercise and execution of all and every other power or powers, authorities or authority, enabling her in that behalf, did, by the indenture now in statement, sealed, &c., direct, limit, and appoint that the messuages, lands, and hereditaments respectively comprised in and limited and assured by the hereinbefore-stated indentures of the 18th

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and 19th April 1794, with their appurtenances, should, from and after the determination of the estate and interest limited prior to the said power of appointment, remain and be to the uses, upon the trusts, and for the ends, intents, and purposes, in the indenture now in statement limited, expressed, and declared of and concerning the same, that is to say, after a term of ninety-nine years, and certain annuities thereby limited therein, as to the said estate called *Nantycroy*, to the use of *Bridget Evans* for life, remainder to the use of the trustees *William Davies* and *Lewis Evans* during her life, to preserve contingent remainders, with remainder to the use of the children, except any eldest son of said *Bridget Evans*, in fee as tenants in common; and, failing such children, to the use of the eldest son in fee, with other executory limitations over in fee simple. And it was (by the said indenture now in statement) provided, and the said testatrix *Anne Evans* did thereby reserve to herself, full power and authority at any time or times thereafter, by any deed or deeds to be sealed and delivered by her in the presence of and to be attested by two or more credible witnesses, to alter, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all or any of the uses thereinbefore limited of and concerning the said messuages, lands, and hereditaments thereby appointed or intended so to be, or any of them, or any part thereof; and by the same or any other deed or deeds to be sealed, delivered, and attested as last therein mentioned, to make any other direction or appointment which might have been made under and by virtue or means of the power of appointment reserved to her as therein aforesaid, of and concerning so much and such part of the said messuages, lands, and hereditaments, and the estate and interest therein, to which such revocation should extend.

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By an indenture of revocation and new appointment, dated 5th July 1833, and made between the said testatrix *Anne Evans*, of the one part, and *Alfred Thomas* and the said *Lewis Evans*, of the other part, *Anne Evans*, after reciting the hereinbefore-mentioned indentures of the 18th and 19th April 1794, and the 5th June 1830, and reciting that the said testatrix *Anne Evans* had not in any manner exercised the said power of revocation and new appointment limited to her by the lastly thereinbefore-recited indenture, and reciting that the said testatrix *Anne Evans* was desirous of exercising her said power of revocation and new appointment in manner and to the effect hereinafter expressed, and also of substituting the said *Alfred Thomas* as a trustee in the place of the said *William Davies*, it was (by the indenture now in statement) witnessed, that by virtue and in exercise and execution of the power and authority to the said testatrix *Anne Evans* for that purpose given, limited, or reserved by the lastly thereinbefore-recited indenture, and in pursuance and in exercise and execution of every other power and authority enabling her in that behalf, the said testatrix *Anne Evans* did by the deed in writing now in statement, by her sealed, &c., revoke, determine, and make void all and every the use and uses, estate and estates, trust and trusts, powers and limitations in the said thereinbefore in part recited indenture of appointment contained or thereby limited or appointed of and concerning all and every the messuages, lands, and hereditaments thereby appointed or intended so to be. And by the deed now in statement, executed by the said testatrix *Anne Evans*, and attested as aforesaid, the said testatrix *Anne Evans* did limit, declare, and appoint, that immediately after the execution of the deed now in statement, all the said messuages, lands, and hereditaments comprised in the hereinbefore-mentioned

indenture of the 5th June 1830, and so limited and appointed as therein aforesaid, with their appurtenances, should, from and after the determination of the estate and interests, prior to the power of appointment of the said testatrix *Anne Evans*, remain and be to the uses, upon the trusts in the indenture now in statement limited, expressed, and declared of and concerning the same, that is to say, after a term of ninety-nine years; and certain annuities thereby limited then as to the said estate called *Nantycroy*, to the use of the said *Bridget Evans* for life, remainder to the use of the trustees *Alfred Thomas* and *Lewis Evans* during her life, to preserve contingent remainders, with remainder to the use of the children of the said *Bridget Evans*, except the eldest child, as she should by deed appoint, and, in default of appointment, to the use of all such children, except the eldest son in fee, as tenants in common, and failing such children, to the use of the eldest son in fee, with other executory limitations over in fee simple. And it was, in the indenture now in statement, provided, and the said testatrix did thereby reserve to herself, full power and authority, at any time or times thereafter, by any deed or deeds to be sealed and delivered by her in the presence of and to be attested by two or more credible witnesses, to alter, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all, every, or any of the uses, trusts, intents, purposes, powers, provisoes, limitations, declarations, and agreements thereinbefore limited, expressed, and declared of and concerning the said messuages, lands, and hereditaments thereby appointed or intended so to be, and by the same or any other deed or deeds to be so sealed and delivered and attested as therein last-mentioned, to make any other direction or appointment which might have been made under or by virtue or

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means of the original power of appointment reserved to her as therein aforesaid, of and concerning so much and such part of the said messuages, lands, and herditaments, and the estate and interest therein to which such revocation should extend.

By another indenture of revocation and new appointment, dated the 16th July 1835, and made between the said testatrix *Anne Evans*, of the one part, and the said *Alfred Thomas* and *Lewis Evans*, of the other part, and which last-mentioned indenture was duly executed by the said testatrix *Anne Evans*, *Alfred Thomas*, and *Lewis Evans*, and duly attested, after reciting the hereinbefore mentioned indentures of the 18th and 19th April 1794, and the said indentures of the 5th June 1830 and the 5th July 1833, and that the said testatrix was desirous of exercising the said last-mentioned power of revocation and new appointment in manner and to the effect thereafter expressed, it was by the indenture now in statement witnessed, that by virtue and in exercise and execution of the power and authority to the said testatrix *Anne Evans* for that purpose given, limited, or reserved by the therein lastly recited indenture, and in pursuance and in exercise and execution of every other power and authority enabling her in that behalf, the said testatrix *Anne Evans* did by the deed in writing now in statement by her sealed and delivered in the presence of and attested by two credible witnesses, revoke and determine and make void all and every the use and uses, estate and estates, trust and trusts, powers and limitations in the said lastly thereinbefore in part recited indenture of appointment contained, as thereby limited or appointed of and concerning all and every the messuages, lands, and hereditaments thereby or intended so to be; and by the indenture now in statement, by her executed and attested

as therein aforesaid, did limit, declare, and appoint, that immediately after the execution of the indenture now in statement, all the said messuages, lands, and hereditaments by the said indentures of the 5th June 1830 and 5th July 1833 limited and appointed as therein aforesaid, with their rights, members, and appurtenances, should from and after the determination of the estates and interests prior to the said power of appointment of the said testatrix *Anne Evans*, remain and be to the uses, upon the trusts and for the ends, interests, and purposes therein limited and declared of and concerning the same, that is to say, after a term of ninety-nine years; and certain annuities thereby limited, then as to the said estate called *Nantycroy*, to the use of the said *Bridget Evans*, for life, with remainder to the use of the trustees *Alfred Thomas* and *Lewis Evans* during her life, to preserve contingent remainders, with remainder to the use of the children, except the firstborn son of the said *Bridget Evans*, as she should by deed appoint; and in default of appointment, to the use of all such children except the firstborn son in fee, as tenants in common; and failing such children, to the use of the firstborn son in fee, with other executory limitations over in fee simple. And in the indenture now in statement it was provided, and the said testatrix *Anne Evans* did thereby reserve to herself, full power and authority at any time or times thereafter, by any deed or deeds to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, to alter, change, vary, revoke, determine, and make void, either in part or in the whole, the direction and appointment thereinbefore made by her, and all and every or any of the uses, trusts, intents, purposes, powers, provisos, limitations, declarations, and agreements thereinbefore limited, expressed, and declared of and concerning the same messuages, lands, and hereditaments thereby appointed; and by the same or any other deed or deeds

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to be so sealed and delivered and attested as last mentioned, to make any other direction or appointment which might have been made under or by virtue or means of the original power of appointment reserved to her as therein aforesaid, of and concerning so much and such part of the said messuages, lands, and hereditaments, and the estate and interest therein, to which such revocation should extend.

That the said *Anne Lewis*, widow, afterwards intermarried with and became the wife of *Thomas Davies*, Esq., and that the said *Anne Davies* died on the 12th August 1836 in the lifetime of her husband the said *Thomas Davies*.

By a deed-poll under the hand and seal of the said testatrix *Anne Evans*, dated the 26th August 1836, and which was duly executed by the said *Anne Evans*, and duly attested, after reciting the said indentures of lease and release, dated respectively the 18th and 19th April 1794, and the indentures dated respectively the 5th June 1830, and the 5th July 1833, and the 16th July 1835, and that the said testatrix *Anne Evans* was desirous of exercising the said last-mentioned power of revocation in manner and to the effect thereafter mentioned, it was by the deed-poll now in statement witnessed, that by virtue and in exercise of the power and authority to the said *Anne Evans* given by the said last therein recited indenture, and in exercise and execution of every other power and authority in anywise enabling her in that behalf, the said testatrix *Anne Evans*, by the deed-poll now in statement, sealed and delivered in the presence of and attested by two credible witnesses, did absolutely revoke, determine, and make void all and every the use and uses, estate and estates, trust and trusts, powers and provisoes, declarations and limitations, in and by the

said lastly thereinbefore recited indenture of appointment of the 16th July 1835 contained, concerning the several messuages, lands, tenements, and hereditaments therein particularly described.

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Anne Evans made her last will and testament in writing, dated the 3rd March 1848, and which was executed by her in the presence of and attested by three witnesses; and by the said will, after reciting the hereinbefore stated indentures of lease and release, bearing date respectively the 18th and 19th April 1794, and purporting to be in exercise and execution of the power or authority so given or reserved to her as aforesaid, and of every and any other power or authority enabling her in that behalf, she the said *Anne Evans* did give, devise, direct, limit, and appoint unto the Plaintiffs, and to their heirs and assigns, all that messuage or tenement, farm and lands, with the appurtenances thereunto belonging, commonly called and known by the name of *Nantycroy*, situate, lying, and being in the parish of *Verwick*, in the county of *Cardigan*, upon the trusts, intents, and purposes following: (that is to say), upon trust that they the said Plaintiffs, and the survivors and survivor of them, and the heirs, executors, or administrators of the survivor of them, and their and his assigns, should as soon as conveniently might be after the said testatrix's death, sell and absolutely dispose of the same, either together or in parcels, &c., and to convey and assure the premises which should be so sold to the purchaser or several purchasers thereof, and their heirs, or otherwise as he, she, or they should direct and appoint. And the said testatrix *Anne Evans* appointed the said Plaintiffs executors of her said will.

The testatrix *Anne Evans* departed this life on the 28th May 1848, without having altered or revoked her

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said will, and the same was, on the 13th July 1848, duly proved by the said Plaintiffs, the executors of her said will, in the proper Ecclesiastical Court, and they thereby became and now are the sole legal personal representatives of the said testatrix.

The Plaintiffs accepted the trusts of the said will of the said *Anne Evans*.

The Plaintiffs did, upon the death of the said testatrix *Anne Evans*, enter into the possession or receipt of the rents and profits of the real estate called *Nantycroy* aforesaid, claiming to be entitled thereto as trustees under the said will of the said *Anne Evans*, and claiming to be entitled in execution of the trusts reposed in them by the said will of the said testatrix to sell the same, did accordingly, on the 28th October 1848, put up the said estate called *Nantycroy* to sale, and the said Defendant *Samuel Jones Evans* was the highest bidder, and was declared the purchaser of the said estate, at the said sale, at the price or sum of 2010*l*. The said Defendant *Samuel Jones Evans* objected to complete the said purchase, because he was advised that under the circumstances herein appearing the will of the said testatrix *Anne Evans* was not an effectual or valid appointment or devise of this estate called *Nantycroy* to the Plaintiffs *John Evans*, *John Pugh*, and *Thomas Jones*, and that the said Plaintiffs were therefore unable to make a good title thereto in fee simple; but save such objection and the satisfaction of the trust term of five hundred years created in favour of the said *John Evans*, as in the said indenture and hereinbefore is mentioned, the Defendant *Samuel Jones Evans* was content with and had accepted the said title.

David Hughes Saunders was the second son of the said *Thomas Saunders*, which said *David Hughes Saunders* departed this life in the month of November 1823 in

the lifetime of the said testatrix, having in his lifetime been married, and had lawful issue, and leaving *Thomas Jones Saunders*, his eldest son and heir-at-law him surviving, and the said *David Hughes Saunders* did not bar the estate tail limited to him in the said estate called *Nantycroy* by the said indenture of settlement of the 19th April 1794, and such estate tail, unless defeated by the due execution of the powers in the said settlement also contained, descended upon and is now vested in the said *Thomas Jones Saunders*.

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The said *Thomas Jones Saunders* is still living, and is a Defendant, and contends that he is entitled to the said estate called *Nantycroy* as tenant in tail under the uses declared by the said indenture of the 18th and 19th April 1794, by reason, as he alleges, that under the circumstances herein appeared no valid appointment of the said estate has been made by the said testatrix *Anne Evans*.

The Plaintiffs, as such devisees and executors as aforesaid, submit that the appointment made by the said testatrix *Anne Evans* by her said will, of the said estate, under the power reserved to her by the said indenture bearing date the 19th April 1794, is valid, and that the said appointment ought to be carried into effect; and if not, then the said Plaintiffs, as the legal personal representatives of the said testatrix, submit that they are entitled to have the sum of 400*l.* and the interest due thereon from the decease of the said *Anne Davies*, formerly *Anne Lewis*, widow, raised by sale or mortgage of the hereditaments comprised in the said term of two hundred years created by the said indentures of the 15th and 16th days of March 1793.

The statement of the points for decision was as follows:—Under the circumstances aforesaid it had been

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determined by the parties hereto, to concur, and they thereby concurred, in the statement of the facts herein contained, for the opinion of this honourable Court thereon, under the provisions of the said Act. The parties therefore pray the opinion of this honourable Court, whether the appointment made by the said testatrix *Anne Evans*, by her said will or testamentary appointment, is or not a good and valid disposition in fee simple of the said estate called *Nantycroy*, comprised in the said indentures of the 18th and 19th April 1794; and if not, then the Plaintiffs, and the said *Thomas Jones Saunders*, pray the opinion of this honourable Court, whether the Plaintiffs, as the legal personal representatives of the said testatrix *Anne Evans*, are or are not entitled to have the sum of 400*l.*, and the interest due thereon from the decease of the said *Anne Davies*, formerly *Anne Lewis*, widow, raised by sale or mortgage of the hereditaments comprised in the said term of two hundred years created by the said indentures of the 15th and 16th March 1793.

The only point of importance was, whether the appointment by will was good.

Mr. *Pitman* (with whom was Mr. *Malins*) stated the case.

He argued on the intention, that Mrs. *Evans* having power to appoint by deed or will, and having exercised it by deed, did not, by reserving to herself a power to reappoint by deed only, intend to destroy her power to appoint by will; by the deed-poll of 1836 she destroyed all the antecedent transactions. It was not necessary that she should reserve any power; having destroyed the previous uses, the old power revived without any necessity to create or reserve a new one.

Mr. *Daniell* and Mr. *Greene*, for *Thomas Jones Saunders*, claiming in default of appointment.

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The appointment was but for life, with a general power of appointment. What was the effect of the first appointment by the deed of 1830? It was completely to exercise and exhaust the power, and after that there could be no power under the original power to appoint by will any more than by deed. Any appointment now to be made must be in pursuance of the new powers reserved; Mrs. *Evans* might have reserved a power of new appointment in *any* form. She did reserve a power of appointment by deed only; then by the deed of 1833, she exercises her new power of appointing by deed, reserving another power to appoint by deed and by deed only. Then by the deed of 1835 she does the same. Then the deed of 1836 simply revokes the uses of the deed of 1835.

[The *Vice-Chancellor*.—Had she not power still to appoint by *deed* under the deed of 1835?]

Yes, she had power to do so by *deed*, but not by will.

They cited *Hele v. Bond* (a), to show that the deed of 1830 was a complete exercise of the original power, and that any new appointments must be under the particular power reserved by that deed; Sug. Powers, vol. 1, 6th edition, 117, 470. They referred in particular to pp. 462, 463 of vol. 1.

Mr. *Glasse* and Mr. *Beavan*, for the Purchaser.

Mr. *Malins*, in reply.

By the original settlement, the power was quite general. By the exercise of her power in the deed of

(a) 2 Sug. Powers, App. 575.

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1830, Mrs. *Evans* reserved to herself the power to revoke or alter, or vary the entirety of the deed. The exercise of the power of revocation sets up the old uses. By the deed of 1833 she does revoke everything contained in the deed of 1830, including the power of new appointment, and thereby revives all the uses of the settlement, and by that she again reserves to herself power to revoke generally, and to appoint by deed.

By the deed of July, 1835, she revokes the deed of 1833. She avoids the whole contents of that deed, reserving to herself again power to revoke and to make a new appointment. On these instruments the intention is clear not to make a final settlement.

Then as to the effect of the deed of 1836, it revokes everything in the deed of 1835; including the power of reappointment. She never intended to abridge her original power, nor does she; she has simply made a series of appointments, which she has reserved to herself power to destroy; she has destroyed them, and by so doing she left subsisting or revived the original power to appoint by will, and her will is therefore good. (They cited *Sheffield v. Donop* (a).)

Mr. *Greene*, in reply, on the case of *Sheffield v. Donop*. That case related only to personal estate. In that case too, there was no expression that new powers should be exercised in any particular form. In this case there is a particular power which is not revoked, and no other power can be implied; the point here is simply this: All the original limitations under the exercise of the powers are gone; and there remains only the power

to appoint by deed left subsisting by the deed-poll, and that power is to be interpolated in the original settlement. It has never been exercised, and therefore those entitled in default of appointment, take.

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On the 26th of February the VICE-CHANCELLOR delivered the following judgment:—

The first question raised in this special case, is, whether the will of *Anne Evans* operated to pass certain real estate by way of appointment; which depends on the question, whether, at the time of the execution of the will and of the death of *Anne Evans*, she had power to appoint by her will.

The facts bearing on the question are these: By indentures of lease and release, dated the 18th and 19th April 1794, being the settlement made on the marriage of *Anne Evans* with *J. Evans*, certain real estate of which she was seised in fee, was conveyed to various uses, which it is not necessary here to mention, as they have become exhausted, with remainder to the following uses. [The Vice-Chancellor stated the uses set forth in p. 417.]

The marriage took place; there were no children; the husband died; and *Anne Evans*, being a widow, executed a deed, dated the 5th June 1800, by which she exercised the general power reserved by her marriage settlement, reciting that deed, and the power given to her; that she was desirous to exercise it, &c. [The Vice-Chancellor stated the material parts of the deed referred to in p. 418.]

Then she repeated the same process, by another deed dated the 5th July, 1833. In that, she exercised her

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power of revocation, and appointed new uses, and again reserved a power of revocation and new appointment.

Then by a deed dated the 16th July, 1835, the same process was again gone through. And then by the last deed, which was dated the 26th August 1836, by which, reciting all the prior instruments, and reciting other matters, it was witnessed, &c. [The Vice-Chancellor stated the terms of the deed referred to in p. 424.]

By this deed, then, she exercised her power of revocation, but did not exercise her power of new appointment.

Afterwards she made her will, dated the 3rd March 1848, and thereby she directed, limited, &c. [The Vice-Chancellor stated the appointment on trust for sale set out in p. 425.] If *Mrs. Evans* had power to appoint, the will was undoubtedly a valid execution of the power; but the question is, whether, when she made her will, she had any power so to appoint; whether, in other words, the original power in the settlement of 1794 was at the time *Mrs. Evans* made her will, an existing power. In order to come to a conclusion on this question—a question which is by no means clear, and on which I do not find that there is any direct authority—it is necessary to consider what is the effect of each of the several instruments that have been executed.

Now, what is the effect of the deed of 1830, the first deed?

It must be recollected that, at the time of the execution of the deed of 1830, by virtue of the settlement of 1794, and of the events which had happened, the

lands in question, at the date of that deed of 1830, stood limited to the use of *Anne Evans* for her life, with remainders, &c. [The Vice-Chancellor referred to the uses set out in pp. 418 and 419.] Then there was the general power, and in default of appointment, remainders over. The power enabled her to appoint in fee by deed or will. It has been suggested that the power to appoint by deed or by will, might be considered as two powers: one a power to appoint by deed, and another to appoint by will. It appears to me that there is no foundation for that suggestion. The power to appoint by deed or will is a single power: the party has an option to appoint by one or other of two distinct instruments, but he has not two powers. Mrs. *Evans* had an option, indeed, to exercise her power partly by deed and partly by will. She elected to execute the power by deed, and did execute the deed of 1830 expressly for the purpose of exercising her power, and thereby limited estates to uses, amounting to a limitation of the fee.

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Now if she had stopped there, the effect would be clear: according to the well-known rule, the new uses thus created, must take effect as if they were introduced into the deed of 1794, in lieu of the power of appointment, and of the estates created by that deed in default of appointment; the lands in question would then have stood limited thus: to the use of *Anne Evans* for life, with the remainders preceding the power, and then remainder to the new uses, &c.

That would have been clearly the effect, if the deed of 1830 had stopped with the execution of the power. But then the effect would also be, that the original power contained in the settlement of 1794 would be at an end,

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so that it would be impossible to make any future appointment under that power, either by deed or by will. But the deed did not stop at the execution of the power: it went on to reserve to *Anne Evans* a power by deed only, to revoke the uses appointed, and a power by the same deed or by any other deed, to make any other appointment: she reserved to herself the power of revoking the uses of the deed of 1830, and of substituting any other uses; and I refer to what might have been done under the deed of 1794, only made in order to point out what was the extent of the new power. Then the question is, did the reservation of the new power, in any way keep alive, or did the subsequent exercise of that new power restore, the original power of appointment of the settlement of 1794?

Now here I must observe, that whether, where a power of revocation alone is reserved, there is or is not a power of new appointment,—when both are reserved, they are two distinct powers: a power of revocation may exist and be exercised without a power of new appointment.

And another observation which occurs is this: that a power of new appointment reserved in a deed exercising a general power of appointment, is a new power, quite distinct from the original power.

It is true that when the power is exercised, the uses created are served out of the original *seisin*, just as the uses created under the original power, are served out of that *seisin*. But still the power so reserved is a new power. That this is so, is clear from the following considerations:—

A new power of revocation may be so reserved as to

be capable of being exercised by different species of instruments, and with different formalities from those required by the original power; it may be reserved even to different persons: this would be impossible if the power of new appointment were the same power as the original power. It must, therefore, be a distinct power. But if it is a new and distinct power when required to be exercised with different formalities, or by different persons, it cannot be less a distinct power because it may be exercised with the same formalities, or by the same person. If, then, the power of new appointment reserved by the deed of 1830 was a new power, was the original power contained in the settlement of 1794 still subsisting after it had been exercised, and a new power had been created?

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In considering this, I must observe, firstly, that it is, to say the least, very questionable whether it is legally possible for two distinct general powers of appointment in fee, to coexist in the same donee; and it is equally unintelligible how they could co-exist, whether the two powers are to be exercised by the same instrument or by different ones. But suppose an original power to appoint in fee, exercisable by deed attested by *two* witnesses; and a new power to appoint the same fee exercisable by deed also, but attested by *one* witness: suppose it possible that two such general powers can coexist, what is there in the case before me to produce that effect? What is there in the deed of 1830 applicable to the original power, to cause it to retain its vitality, and be still capable of being exercised? If the intention is to be looked at, there is no evidence or indication of any such intention in the deed of 1830; on the contrary, the very opposite intention is to be collected from the

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reservation of a new power. If *Anne Evans* had intended to preserve the original power of the settlement of 1794, she surely would not have carried out that intention by creating a new power of appointment: it is clear that there was no intention on her part to preserve the original power, even assuming that she could have done so.

Another argument against the continued existence of the original power, is derived from the clearly established rule of regarding the uses created by a deed exercising a power, as embodied in the deed creating the power.

If the deed of 1830 had reserved no power of revocation, the uses of that deed, if inserted in the deed of 1794, would be substituted for the original power, and all the uses created by it in default of appointment; and then the original power would be exhausted. If that would be the effect, if there had been no power of revocation, the addition of that power cannot alter the case, so as to prevent the extinction of the original power.

If, then, the mere *reservation* of a power of revocation and new appointment cannot prevent the destruction of the original power, the next consideration will be, Does the *exercise* of the new power of appointment *restore* the original power?

Lord *St. Leonards*, in his book on Powers, does not address himself to this precise point; but he does discuss this: Whether, if a power of revocation only is reserved, without a power of new appointment, and the power of revocation is exercised, a new power of appointment arises? And his opinion is this: that if a

power of revocation is reserved in the original settlement, then a power of new appointment is implied ; but if the power of revocation is reserved in a deed *executing* a power, that will not authorize a limitation of new uses (1 Sug. Pow. 6th edit. p. 485). The view of Mr. *Preston*, in his treatise on Abstracts, is different from that taken by Lord *St. Leonards*. Mr. *Preston* is of opinion that a power of new appointment is never implied. This opinion, I think, is quite untenable : there is no authority for it. Indeed, Mr. *Preston's* views appear to have been stated with very little regard to decided cases ; while Lord *St. Leonards* labours to reconcile various decided cases, which it appears to me difficult to reconcile, without very artificial distinctions not consistent with any general principle. The discussion proceeds entirely on the assumption that a power of revocation only is reserved without a power of new appointment, and that does not directly apply to this case, where there is an express power of new appointment reserved by the deed of 1830. And both the powers are simultaneously exercised by the deed of 1833, which reserves again a fresh power ; and the point now is, whether the exercise of the power in that deed revives the original power of the deed of 1794. Now, I cannot conceive on what ground the execution of the power by the deed of 1833 can revive the original power.

The clear effect of the deed of 1833 was to substitute the uses and power of revocation and new appointment, created and reserved by that deed, for the uses and powers created and reserved by the deed of 1830. There is, however, one clear distinction between the deed of 1830 and the deed of 1833 ; viz. the former was executed in exercise of what Lord *St. Leonards* calls a primary power—a power preceding the uses ; whereas the deed

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of 1833 was in exercise of a power of revocation and new appointment following the uses ; and assuming his Lordship's view to be correct, if there had been a power of revocation only in the deed of 1833, the exercise of that power could not revive the original power ; *à fortiori*, it could not have that effect, when there is an express power of new appointment reserved.

I think, then, that the deed of 1830 had not the effect of *keeping alive* the original power of the settlement of 1794, by the reservation of the powers of revocation and new appointment contained in the deed of 1830 ; and that the exercise of those powers by the deed of 1833 had not the effect of *reviving* the original power.

The next thing to be considered is the deed of 1835. That repeated the process carried into operation by the deed of 1833. And all the observations that I have made on the deed of 1833 apply to the deed of 1835. There is this additional observation applicable to each of those deeds : Although by each of them *Anne Evans* exercised simultaneously her power of revocation and her power of new appointment, it was not necessary that she should do so ; she might have done it by two deeds executed at different times. She might by the deed of 1835 have exercised her power of revocation only ; and if she had taken that course, what would have been the effect ? Why, the power of new appointment reserved by the deed of 1833 would have remained a subsisting power ; and if at a subsequent period she had made an appointment, that would have been an appointment in exercise of the power reserved by the deed of 1833, and not of the original power.

I now come to the last deed of 1836. By that, *Anne*

Evans exercises the power of revocation reserved by the deed of 1835, without exercising the power of new appointment; but she did not by the exercise of the power of revocation destroy the power of new appointment: that power continued a subsisting power, and might have been exercised by a subsequent deed. The power of appointment reserved was, however, to appoint by deed only, and not by will. But even if there were ground for saying that the deed of 1836 not only revoked the uses of the deed of 1835, but extinguished the power of new appointment of that deed, still I should deny that the original power of the deed of 1794 was revived. From the time of the execution of the deed of 1835, the general power of appointment reserved by that deed was a valid power down to the time of the deed of 1836: the original power had ceased to exist since 1830; and I cannot conceive how the extinction of the subsisting power (supposing it to be extinguished) could recall a non-existing power.

For these reasons I am of opinion, that by the deed of 1830 the original power was at an end; and that the will of *Anne Evans* was inoperative as to the lands, the subject of that power.

It is proper to state that, in what I have said in this case, I have had in view exclusively the case of a general power: special powers may rest on a different footing, and have not been in my contemplation.

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1853 :
18th January.

Will.

Construction.
Vested Interest.

Testator gave personal estate, outstanding on securities, to his wife for life, remainder in a moiety to six of his children ; provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over.

One of the children died after the wife's death, before the securities were realized and the produce divided. Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment ; and that the representatives of the deceased child took a share.

RE DODGSON'S TRUST, AND THE 10 & 11
VICT. c. 96.

JAMES DODGSON by his will gave his monies, securities, securities for money, &c., to trustees on trust, after payment of his debts, &c., to invest the same, and then upon trust for his wife for her life ; and from and after her decease, he directed that his trustees should pay one moiety or equal half-part of his said personal estate to his son *W. Dodgson*, his executors and administrators, and should pay and divide the other moiety or half-part of his said personal estate unto and equally between and among all his children, *Ann Dodgson*, *John Dodgson*, *George Dodgson*, *Jane* the wife of *Thomas Mason*, *Hannah Dodgson*, and *James Dodgson*, share and share alike : the testator then gave special directions about the share of his daughter *Jane Mason* ; and then followed this proviso : " Provided, and I do hereby declare my will to be, that if any of my six last-named children should happen to depart this life *before they shall receive their respective portions, without leaving lawful issue*, the share or shares of him, her, or them so dying, of and in my said estate and effects, shall go and accrue to the survivors or survivor of such children, and be equally divided among them ; if more than one, share and share alike, and if but one, then to such only child ; and in case of the death of any other of the children without leaving lawful issue, then such accruing share or shares shall again become subject to the same right, chance, contingency, or condition of accrue."

The testator left him surviving his widow and the six children named. The widow died in 1850. *Hannah*, the daughter, married in 1850 a Mr. *Mason*, and died in 1851, without leaving any issue.

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TRUST.

At the time of the testator's death his property was invested in various securities.

The trustees did not, during the life of *Hannah Mason*, pay to her, or to any other of the children, any sum in respect of the testator's bequest to them; and the securities in which the testator's property was invested were not realised till after her death; so that she never received her portion.

On the death of *Hannah Mason*, her representatives having claimed one-twelfth of the proceeds of the testator's estate for her share, the trustees paid it into Court under the Trustees Relief Act; and this petition was now presented by four of the other children, claiming it for themselves and the remaining child, to the exclusion of *Hannah's* representatives.

Mr. *Bacon*, for the Petitioners, contended that they, as survivors, were entitled; that the testator expressly provided for the event of any child not receiving his portion, and in this event, which as to *Hannah* had happened, the share of that child went over.

He cited *Elwin v. Elwin* (a), *Law v. Thompson* (b).

Mr. *Follett*, and Mr. *T. B. Allen*, for the representatives of *Hannah*, were not called upon.

(a) 8 Ves. 546.

(b) 4 Russ. 92.

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TRUST.

The VICE-CHANCELLOR :

What the testator meant was this: He directed his widow to have the income during her life. There is no other direction or disposition till her death: after her death he directs the payment of one moiety to his son *William*, and of the other moiety to his other children; and after the direction to invest *Jane's* share, comes the proviso. Now this is merely a direction not to pay and divide the shares till the death of the widow; not, as in *Elwin v. Elwin*, a postponement of the division till the completion of a sale. Then the testator refers to the time at which the Petitioners would be entitled to receive shares, not to the time of actual receipt. (His Honor commented on *Law v. Thompson*, distinguishing it from the case before him, and proceeded.) It appears to me, without at all infringing or disagreeing with those cases, that what the testator here meant to refer to was not the period of the fund actually getting into the legatee's hands, but the happening of the event on which she would be *entitled* to receive it. I must decide, therefore, that *Hannah's* legal personal representatives are entitled to a share.

WIDDICOMBE v. MULLER.

HENRY SYMONDS by his will gave to his executors 20*l.* Long Annuities upon trust, for the maintenance and education of *Harriet Hawkins* till she should attain twenty-one, and then upon trust to pay such annuity to her for life for her separate use ; and after her decease to pay such 20*l.* Long Annuities for the maintenance and education of all or any child or children she might leave her surviving, share and share alike ; if more than one, during their respective minorities ; and on his, her, or their attaining twenty-one, upon trust to assign the annuity equally between them, if more than one, and if but one, the whole to such one. "But if the said *Harriet Hawkins* shall die without leaving any lawful issue her surviving, or, leaving any such, he, she, or they shall die under the age of twenty-one years, then upon further trust to pay and apply such annuity of 20*l.* per annum Long Annuities towards the maintenance and education of *Robert Hawkins* and *Elizabeth Hawkins*, the brother and sister of the said *Harriet Hawkins*, in equal moieties during their respective minorities ; and upon their respectively attaining the ages of twenty-one years, upon trust to assign and transfer such annuity of 20*l.* per annum Long Annuities equally between them, *if both living ; but if either of them shall be then dead, then upon trust* to assign and transfer the whole of such annuity of 20*l.* per annum Long Annuities to the survivor of them the said *Robert Hawkins* and *Elizabeth Hawkins*, for his or her absolute use and benefit, discharged of all further trusts concerning same."

1853 :
3rd March.

Will.
Construction.

Testator gave Long Annuities to *A.* for life, and if she died without leaving issue her surviving, then to *B.* and *C.*, to be paid to them at twenty-one, *if both living ;* but if either should be *then* dead, *then* to the survivor. *B.* and *C.* both attained twenty-one, but died in the lifetime of *A.*, who died without issue. Held, that the word *then* had reference to the death of *A.* without issue ; and that the residuary legatee, and not the representatives of *B.* and *C.*, took.

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Harriet Hawkins died without having been married; *Robert* and *Elizabeth* both attained twenty-one, and died in the lifetime of *Harriet Hawkins*.

The question was, whether the representatives of *Robert* and *Elizabeth* took any interest, or whether the 20*l.* Long Annuities passed to the residuary legatees.

Mr. *Hardy* and Mr. *Pownall*, for the representatives of *Robert* and *Harriet Hawkins*.

The words "if both living," and "but if either of them shall be then dead," are to be read, if both live to attain twenty-one; but if either die under twenty-one, then to the survivor. The word "then" after the limitations to *Harriet* and her children, refers to the event, not to the time: the testator did not mean by the words "if both living," to point to the being *living*, but to *both* being living. He had given the fund to both; and then, to provide, in the event of one dying under twenty-one, against the possibility of the representatives of that one taking, he adds the words "if *both* living," preceding the limitation over to the survivor. If the word "then" is referred to the *time* of *Harriet's* death, the effect would be to make the survivor of *Robert* and *Elizabeth* take, although under twenty-one, when it is clear the testator did not mean either to take till twenty-one.

Mr. *Follett* and Mr. *Hodgson*, for the residuary legatees.

The effect of Mr. *Hardy's* argument is to strike out altogether the words "if both living." The gift is of the corpus of the fund, the annuities themselves.

The true construction is, if both survive *Harriet*, they

are both to have the fund ; if one only survives her, he or she is to have it : the event of neither surviving is not contemplated ; there is no gift in that case ; and that event having happened, the fund falls into the residue.

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Mr. *Hardy*, in reply.

The VICE-CHANCELLOR :

There is great difficulty in ascertaining what the testator meant. The will appears to have been carefully drawn, and by a professional person.

The terms used in the particular gift for my consideration cause this dilemma. You must either apply the word "then" in the passage following "if both living," not to the immediately preceding passage in the will, but to a passage antecedent and at some distance ; or you must give to it a meaning quite inappropriate. One thing is clear : both the passages must be referred to the same contingency. If the words, "if both living," refer to living to attain twenty-one, then the words, "if either of them shall be then dead," must mean, if either die under twenty-one. I think, however, that it is impossible to say that that can be the meaning of the words.

In another part of the will there is a gift of a sum for life, with remainder over, and there the word "then" is used clearly as referring to a period of time : that is the only place in the will where the word is so used.

The natural meaning of the word is to refer to a time. Now the words, "if either of them shall be then dead," treating the word "then" as referring to a particular time

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cannot refer to dying under twenty-one. But if you attribute the word in both sentences to the period of the death of *Harriet* without leaving issue surviving, then you are using the term in its natural sense. The difficulty is, that you are then going back to a period of time referred to in an earlier part of the case, instead of to a period referred to in the part more immediately preceding. I must, however, choose between the two difficulties. And the lesser of the two, is to attribute the words to the time of *Harriet Hawkins* dying without leaving issue.

I think what the testator meant was this : If the event happens, and when the event happens, of *Harriet* dying without leaving issue, &c., then I make a disposition, if both *Robert* and *Elizabeth* survive her, in equal shares to both ; but if either of them be dead at that period, then the gift meant for both, if both were living, is to go to the survivor. In the events that have happened, I think the residuary legatee is entitled.

COLLETT v. NEWNHAM.

OWEN v. DERBISHIRE.

WADE v. NEWNHAM.

IN March 1818, *Newnham* was in possession of a *post obit* bond and a warrant of attorney from *Cross*, to secure 21,000*l.* and interest.

1853 :
25th January.
Interest.

In April 1818, *Newnham* assigned this bond and warrant of attorney to *Mence*, to secure 7000*l.*; six common money bonds, to raise in all 17,200*l.*, were subsequently given by *Cross* to *Newnham*.

In July 1818, *Newnham* delivered these six bonds to *Mence*, and at the same time entered into a deed poll, whereby he appointed him his attorney to sell the six bonds to secure the monies then due by *Newnham* to *Mence*.

In 1819, *Newnham* filed his bill against *Mence* to set aside the assignment of the *post obit* bond, and for an account of the dealings and transactions between them. An order was made in that suit on the 11th July 1820, the material parts of which were as follows :—It was ordered that it should be referred to *A. Cullen* to take

A. being indebted to *B.* upon bonds, disputes arose between them as to what was due; and by an order in a suit, referring it to arbitration, and an award made under that order, the debt of *A.* was fixed at 8000*l.*, which was ordered to be paid in two sums on days certain; and if payment was not made, the securities were to be sold, and payment made out of the proceeds. The

8000*l.* and the surplus was to be paid to *A.*; no mention was made of interest. The securities were not, by reason of various transactions, realized for a very long time. Held, that the produce of the securities was not, as against subsequent incumbrancers of *A.*, chargeable with more than the principal sum of 8000*l.*

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an account of the dealings between *Newnham* and *Mence* to the time of the order, and to settle and determine the matters in difference. That the sale of the *post obit* bond should be given up; and if the arbitrator should find any balance to be due from *Newnham* to *Mence*, he should in his award order the same to be paid at such place, and within such time, and as he should think proper; and should direct that in case of default in payment, the securities in the possession of *Mence*, or a sufficient part thereof, should be sold within such time and in such manner as the arbitrator should fix and determine; and that the money to arise from such sale, or to be otherwise produced from the securities, should be applied as the arbitrator should direct; the *post obit* and other bonds, and the evidences of the judgments were to be placed in the hands of certain bankers, and a deed of assignment of them was to be prepared to trustees, in trust, after the arbitrator should have made his award, to sell the securities and apply the produce as the arbitrator should direct, or to deliver them up to *Newnham* if no sale should be requisite, and generally as the arbitrator should direct.

The bonds, &c. were deposited with the bankers, and an assignment of them to *Collett & Serjeant* upon trust was duly entered into, dated the 12th July 1820. The trusts declared of the produce of the sale were, in the first place, to pay and discharge the costs, &c. of *Collett & Serjeant* and the bankers; and as to the residue, after payment of such costs, for such trusts, intents, and purposes as should be directed or declared by the award, to be made pursuant to the order of reference. The bankers were to retain the bonds and warrants of attorney until they should be paid off, discharged, or sold, or should be delivered up under the trusts thereafter declared. And it was provided, that if the arbitrator

should award that there was not any balance due from *Newnham* to *Mence*, or if such balance so awarded should be duly paid according to the award, or so paid that there should be no occasion to resort to a sale of the securities, then the securities should be delivered up to *Newnham*, as the arbitrator should direct. There were the usual trustee clauses, and a power to appoint new trustees in the place of *Collett & Serjeant*.

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On the 26th March 1821, and before the arbitrator made his award, *Mence* became bankrupt, and *Owen* became his assignee.

On the 22nd January 1822 the award was made; and the arbitrator found that *Newnham* was, at the date of the order of reference, indebted to *Mence*, and was, at the date of the award, indebted to his assignees in the sum of 8000*l.* upon the general balance of accounts; and he ordered that *Newnham* should pay to the assignees the said sum of 8000*l.* in manner following:—3000*l.* on the 12th of February then next, at the office, situate in &c., of *Gillibrand*, the solicitor of the assignees, and the sum of 5000*l.*, the residue, at the same place, on the 1st of August then next.

And upon payment of the 3000*l.*, as directed, he ordered that the bankers should deliver the *post obit* bond for 21,000*l.* to *Newnham*, and that, on payment of the 5000*l.*, the bankers should deliver up the remainder of the bonds. And he ordered, that in case *Newnham* should fail or neglect to pay the 3000*l.* and 5000*l.*, then that the bonds, &c., or such of them as should remain in the hands of the bankers, or a sufficient part thereof, should be sold forthwith, subject to the trusts mentioned in the deed of 12th July 1820. And he ordered, that,

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upon the sale of the bonds, or part thereof, being made and completed, the bankers should, out of the monies which might come to their hands by the sale, pay to the assignees of *Mence* so much of the 8000*l.* as should then be unpaid, and pay the residue of the said monies to *Newnham*, and should at the same time deliver up to *Newnham* such of the bonds, &c. as should then be remaining in their hands unsold.

Payment of the 8000*l.* never was made by *Newnham*, nor was any sale ever made of the securities.

By a deed dated the 4th July 1822, to which the father of *Cross* (the maker of the *post obit* bond) and others were parties, certain estates were conveyed to trustees, on trusts for sale and mortgage to raise money to pay the debts of *Cross*, and there were ultimate trusts for the benefit of *Cross* and his issue.

The father of *Cross* died in August 1822, and thereupon *Cross* assumed the name of *Legh*.

In November 1822, the trustees of the deed of 4th July 1822 agreed to admit that there was due to *Newnham* from *Thomas Legh* (formerly *Cross*) 14,200*l.*; and by a subsequent deed of the 21st November 1822, they signed three debentures in favour of *Newnham*, to the extent of 14,202*l.*

The trustees of the deed of 4th July 1822 being unable to agree as to the management of the trust property, one of them in the year 1823 filed a bill against the others, and against the *cestuis que trust*, and against, among others, *Newnham*, but to which *Collett* was no party, for carrying into effect the trusts of the deed of July 1822. This was the suit of *Drever v. Mawdesley* and in that suit an injunction was obtained.

Various proceedings were taken in this suit, occupying a very considerable time, viz., till 1849, in the course of which various orders were made, and directions given touching the claim of *Newnham* upon *Legh*, formerly *Cross*.

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In May 1849, the present suit was instituted by *Collett*, (afterwards replaced by *Derbshire*, the present actual Plaintiff,) the trustee of the deed of 11th July 1820, stating all the foregoing facts, and stating, among other things, that *Newnham* had created a variety of incumbrances on the bonds and securities; and the object of the bill was to have the rights and priorities of the incumbrancers ascertained and paid.

The cause came on to be heard with two other causes, one of which was by *Owen*, affecting the same questions, or some of them; and on the 6th May 1852, a decree was made in the three causes, referring it to the Master, among other things, to inquire what were the charges and incumbrances on the funds in question in the causes, and to state their priorities, and to state what was due in respect of such incumbrances.

In December 1852, the Master made his report, and by it he found that *Newnham* was, at the date of the order of reference, in August 1821, indebted to *Mence*, and was at the date of the report indebted to *Johnson & Owen* (*Mence's* assignees), in the sum of 8000*l.*, on the general balance of accounts: and he ordered the same to be paid in given sums at given places; and after giving consequential directions consistent with the award, he concluded thus:—"I find that the said *S. Owen* is the first incumbrancer on the funds in these causes, subject as aforesaid, (as to certain costs, &c.,) and that there is

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now due to him, under the before-mentioned award, the principal sum of 8000*l.*; but *I am of opinion, that under the said award, the said S. Owen is not entitled to any interest on the said principal sum of 8000*l.*, and I have therefore disallowed the claim made by the said S. Owen, so far as regards interest."*

The other material matters which appeared upon the report are noticed in the judgment.

To this report *Owen* excepted as to interest, contending that the Master ought to have allowed interest on the 8000*l.*, at 5*l.* per cent., from the respective times when the instalments were directed to be paid by the award.

The exceptions now came on to be argued.

Mr. *Chandless*, for *Owen* the exceptant.

The Master has found that *Owen* is entitled to 8000*l.* but to no interest. That is wrong on three grounds :—

Firstly. The debt carries interest of its own nature.

Secondly. If it does not of its own nature, *Owen* is entitled to interest, on account of the obstructions that have been interposed in the way of his getting his debt.

Thirdly. Interest is payable by reason of the nature of the security.

On the first point, the debt is due under an award ; it is not necessary that the award should be made an order of the Court, *Wood v. Taunton* (a). On a debt so found by award, interest is payable, *Pinhorn v. Tuck-*

(a) 11 Beav. 449.

ington (a), *Johnson v. Durant (b)*. The 3rd and 4th Will. IV. c. 42, s. 28, also entitles us to interest ; for this is a debt, a liquidated sum, within that section. The statute applies to debts antecedently contracted, and to interest to accrue before the statute. This point has never been raised at law ; but in *Attwood v. Taylor (c)*, a question of interest arose on a contract, dated in 1825 ; and that the Act applied was assumed, although the interest thereon claimed accrued due before the statute. Besides, the debt is in this case, in effect, due by force of an order of this Court, being by an award made in pursuance of an order ; it is therefore as high as a judgment debt, and bears interest, *Searle v. Lane (d)*.

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Secondly. I rely on the vexatious opposition to the payment of the debt. (He referred to the injunction obtained in *Drever v. Maudesley* as causing delay ; *Grant v. Grant (e)*.) The injunction was not, it is true, *Newnham's*, but his obtaining a *post obit* bond caused it.

Thirdly. As to the effect of the security for the debt—

The security is in effect an assignment to a trustee, to sell, and pay 8000*l*. (He referred to *Clowes v. Waters (f)*.) The grounds on which interest was disallowed in that case, show what is the nature of the instruments that will carry interest. Here there is a liquidated sum, which *Newnham* is bound to pay by force of an order of the Court, *Barwell v. Parker (g)*, *Law v. Hagwell (h)*. It will

- (a) 3 Camp. N. P. 468. (e) 3 Russ. 598.
(b) 4 Car. & P., N. P. 327. (f) 16 Jur. 632.
(c) 1 Man. & Granger, 279. (g) 2 Ves. sen. 364.
(d) 2 Freeman, C. Rep. 103. (h) 4 Dru. & War. 398.

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be said, perhaps, that the incumbrances are not affected by *Newnham's* liability; that the property is not charged, but only *Newnham*; but *Newnham* was our trustee, and could not charge his property as against us (*Barnett v. Sheffield (a)*).

The trust was to sell; it has not been carried out for thirty years, but benefit has been derived from the suspension of the sale, and we ought to participate in that benefit (*Pearce v. Slocombe (b)*, *Hyde v. Price (c)*).

Mr. *Hallett*, with him.

Independently of the recent statute, interest would be allowed at law—and equity follows the law—and there are here equitable circumstances on which equity would give interest even if none could be given at law. At any rate, by 3 & 4 Will. IV. c. 42, it is payable.

[He cited, as to interest being payable at law, *Craven v. Tickell (d)*, *Doran v. O'Reilly (e)*, *Arnott v. Redforn (f)*, *Upton v. Lord Ferrers (g)*, *Lowndes v. Collens (h)*. As to interest on awards, *Churcher v. Stringer (i)*.]

The award directs payment at two particular times, but those payments have not been made by reason of obstruction to the recovery of his debt by *Owen*. If it is said, that is the act of the Court, the Court will cor-

(a) 1 De G. M'N. & Gor.
371.

(b) 3 Y. & Col., Eq. Ex. 84.

(c) 8 Sim. 578.

(d) 1 Ves. jun. p. 63.

(e) 5 Dow. 133.

(f) 3 Bing. 353.

(g) 5 Ves. 801.

(h) 17 Ves. 27.

(i) 2 Barn. & Ad. 777.

rect it. He referred also to *Craze v. Boddingfield* (a), *Atkinson v. Atkinson* (b), *Mercant v. Brown* (c).

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Mr. Glasse and Mr. Faber, for Clark and Squire, incumbancers, argued, that admitting the award might create a liability in Newman personally to pay interest, it created no lien for interest upon the securities. As to the alleged obstructions, Newman had nothing to do with them. The suits were not his, and he had no control over them. They cited *Churcher v. Stringer* (d), *Lee v. Lingard* (e), *Doe v. Squire* (f). On the 3 & 4 Will. IV. they referred to *Hall v. Ellis* (g), and *Oliver v. Latham* (h). As to the argument of the exceptant upon interest upon arrears of annuities, they referred to *Booth v. Leicester* (i), *Martyn v. Blake* (k).

Mr. Bagshawe, for Pearce and Stone, other incumbancers.

Mr. Selwyn, for Wade, the Plaintiff in the third suit.

Mr. Teed, Mr. Roche, and Mr. Shebbeare also took the objection, that the Statute of Limitations, 42nd section, applied and barred more than six years' interest.

Mr. Cairns and Mr. Gifford appeared for other parties.

Mr. Chandless, in reply, on the Statute of Limitations,

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| (a) 12 Sim. 35. | (g) 9 Sim. 530. |
| (b) 1 Ball & Beat. 238. | (h) 1 Phil. 420. |
| (c) 1 Keen, 270. | (i) 3 Myl. & Cr. 459. |
| (d) 2 Barn. & Ad. 777. | (k) 3 Dru. & War. 125 ; |
| (e) 1 East, 401. | see in particular 138. |
| (f) 7 Jur. 236. | |

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said the fund was assigned on express trust for them, and the statute, of course, would not run.

The VICE-CHANCELLOR:

This came before me on exceptions taken to the Master's report, on the ground that he has not allowed interest on a sum of 8000*l.* awarded to be due from *Newnham* to the assignees of one *Mence*.

In argument, many matters have been alluded to which I throw out of consideration, as they were not before the Master, and are therefore not before me. All that was before the Master was the following list of proceedings: An order in the cause of *Newnham v. Mence*, dated July 1820; a deed of submission to arbitration; an order in a supplemental suit dated August 1821; the award of *Cullen*, the arbitrator; two deeds endorsed on the submission; an order on further directions in a cause of *Drever v. Maudesley*; and the Master's report in that cause. From these documents the following facts appear.

[The VICE-CHANCELLOR then stated the facts, observing as he proceeded, upon the award, that the arbitrator having a discretion whether interest should be allowed on the items of account and on the balance, determined that interest should not be allowed; that he found a balance of 8000*l.* due on the 4th of August 1821; that he found that same sum due at the date of his award; and he directed part of the same sum without interest to be paid in February, and the remainder at a later period, still without interest; and he directed that in case these sums should not be so paid, there should be a sale of the securities, which, of course, could not take place without some time elapsing; and when the securities were realised he directed payment simply of the principal.]

The VICE-CHANCELLOR then proceeded:—On these facts and instruments, it appears to me that the contract of the parties is decisive of the case. Considering the order of July 1820 together with the deed of submission, and the subsequent order and award, they come to this in effect: that the parties have agreed that the amount due from *Newnham* to *Mence* should be taken at 8000*l.* without interest, and should be paid out of the proceeds of the securities not yet realised. I cannot vary that agreement, and say, that because there has been delay, the cause of which I do not know, I am to alter the contract. When the parties entered into it, they must have known that after the award was made, considerable time must elapse before it could be known whether there was any necessity for selling; and yet that was their determination. Again, time must elapse before there could be a sale or realisation of the securities. The parties must have known that, and yet their contract is, that when the money is paid, it is to be paid without interest.

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But then it is said, this is a case in which the 8000*l.* was awarded to be paid on two *certain* days; and that, where money is secured by any instrument to be paid on a day certain, then, from the time when the money ought to be paid, interest runs. No doubt there is such a rule to this extent, that if the creditor chooses after the day to bring an action, he may recover interest from that day; so here, the arbitrator having awarded 3000*l.* to be paid on a certain day, and 5000*l.* to be paid on a certain other day, if, after the expiration of those times, *Mence* had brought actions against *Newnham*, I do not say that he would not have been entitled to interest.

But here the question is, What is the contract with

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reference to the right of *Mence's* assignees against the securities? That is the real question; not whether the debt might have been recovered with interest, but the agreement of the parties as to the securities, and their proceeds; they have said those proceeds shall be applied in payment of the principal, without interest. The right to bring an action against the debtor personally, cannot give a better right against the securities, than the contract has given. Therefore, the circumstance that the money is awarded to be paid on days certain, does not affect the question, What is the benefit of the securities?

Another ground that has been argued is, that *Newnham's* conduct has been such as to render him liable for interest, and that those who, as his incumbrancers, claim in his place, have the same liability. The answer to that argument is, that whatever may be the effect of *Newnham's* conduct, I do not judicially know anything about it. It is said that *Newnham* converted the bonds into debentures, and that he had no right to do so. Whether he did do so or not, I do not judicially know. Then again it is argued, that the conduct of *Newnham* in getting an injunction, is another ground for altering the contract about interest. The answer is, nothing of that appears upon the report; I cannot judicially know anything about it.

Another ground taken is, that the sums recovered have been so on the bonds; and that the bonds have actually borne interest. No doubt that is so, and a large sum has been recovered for interest; but that cannot make any difference: it was known to the parties that the securities would bear interest; that, if realised, they would be realised with interest. And with that knowledge they left the matter to arbitration on the terms to which I

have referred, and the arbitrator has decided that no interest is payable.

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On the whole, the conclusion to which I come is, that the Master is right, and the exceptions must be overruled.

TAYLOR v. AUSTEN.

1853:

12th March.

Will.

*Construction.
Power to Settle
on Marriage
with Consent.*

JOSEPH TAYLOR by his will gave and bequeathed as follows: "As to all other my estate and effects, real and personal, or of what other nature or kind soever and wheresoever, I give, devise, bequeath, and appoint the same unto and to the use of my trustees and executors hereinafter named, absolutely upon trust, subject as after mentioned, to pay, distribute, and divide the same unto and equally between and amongst my three daughters, *Jane Frances, Eliza or Elizabeth, and Ann Taylor*, share and share alike, as tenants in common, absolutely and for ever, to be paid and assigned to them as they respectively attain the age of twenty-one years, or be married with the consent of my said trustees or the survivor of them, his executors or administrators, whichever

Testator gave property to his trustees, upon trust to pay, distribute, and divide equally between his daughters, naming them, to be paid and assured to them as they should attain the age of twenty-one, or be married under

der that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same.

There was a power of maintenance, and gifts over as between the daughters on dying unmarried under twenty-one, and if all the daughters should die under twenty-one unmarried, and without leaving issue, then over.

Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent.

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shall first happen; provided always, that if my said daughters shall respectively marry with the consent of my said trustees or the survivor of them, his executors or administrators, I hereby authorize and empower them and him to pay and assign such daughters' respective shares, as well original as accruing, at the times of such marriages respectively, in their or his discretion absolutely, or to convey to fresh or other trustees, to be selected by them or him from time to time, and settle each such daughter's said share, or such only of them as they shall deem proper, upon her and her issue born within a life or lives in being twenty-one years afterwards respectively, each of such daughter's said share which they or he may choose to settle to be for such daughter's sole and separate use," &c. [Then followed directions as to the terms of the settlement.] "Provided also, that if any one or more of my said daughters shall depart this life under twenty-one and unmarried, her or their share, as well original as accruing, shall go to and be paid and divided equally between the survivors of them, or if only one, to such survivor absolutely, subject nevertheless to the last-mentioned proviso." [Then followed a maintenance clause and powers to invest, and then there was this limitation over:—"And in the event of all my said children dying under the age of twenty-one unmarried, and without leaving such issue as aforesaid, then I devise and bequeath all my said estate and effects unto my sister *Eliza* or *Elizabeth Taylor*, of *Liverpool*, spinster, absolutely."

Elizabeth Taylor married *F. Paine*.

Ann Taylor survived her sisters, and became entitled,

subject to the interest of Mrs. *Paine*, to the whole of the testator's property.

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She married the Defendant *H. Austen* while under age, and without the consent of the Plaintiffs, who were the executrix and executor of the surviving trustee of the testator's will. After the marriage this suit was instituted by the Plaintiffs for the administration of the testator's estate, and on its coming on for hearing a question arose, first, whether the Plaintiffs, as representing the surviving trustee, had power under the will to direct or insist on a settlement on Mrs. *Austen*; and, secondly, if they had not, whether the Court would, having regard to the Defendant Mrs. *Austen* being still an infant, direct a settlement on the ground of her having an equity to a settlement.

Mr. *Baily* and Mr. *Hare*, for the Plaintiffs, desired to have the point decided for their guidance, and submitted, that though the testator had used the words marrying *with consent*, the intention must be collected to have been, that on marrying *under age* his daughters' shares should be settled; the testator taking such anxious care to provide for a settlement in the event of his daughters marrying with consent, could not have intended that, if they married without consent, the husband was, as a matter of course, to acquire the dominion of the property. The language must be read in a more enlarged sense, and gave power to the trustees to insist on a settlement on the daughters marrying under age.

Secondly, If that was not the construction, still there was an equity for a settlement in Mrs. *Austen*; and as she was an infant, although she was not a ward

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of Court, the Court would itself at once consider for her the propriety of a settlement, and not wait till her majority.

Mr. *Drewry*, for the Defendants, Mr. and Mrs. *Austen*.

First, The will gives the property immediately, with a direction for payment on the happening of either of two events,—attaining twenty-one, or marrying *with* consent. The proviso then gives the power to the trustees, expressly repeating the words, if the testator's daughters shall marry *with consent*, either to pay their shares immediately, or to settle them. How can it be said that gives a power to settle on marriage *without* consent? The event contemplated has not happened; all that the testator intended was to accelerate the period of payment, if there was a marriage *with consent*; for the case of a marriage *without consent* he made no provision, and left the property then to be paid at twenty-one, and not before, just as if there were no marriage. The literal meaning of the words cannot be got over. But if that were not so, the context of the will shows the intention. For in the limitation over, as between the daughters, and in the ultimate limitation over to Mrs. *Paine*, the testator uses the word *unmarried* simply. Now, if that is construed to mean unmarried generally, *with or without* consent, then it shows that the testator, when he used the words marrying *with consent*, had a special meaning, and limited the power to settle, expressly to the event described. If, on the other hand, the word *unmarried* in the limitations over, is construed to mean, marrying *with* consent, then the effect is, that Mrs. *Austen's* marriage is no marriage within the meaning of those clauses, and would not prevent their taking effect; and yet it is contended that the trustees have

power to pay or settle, which would defeat the limitations over, on an event not contemplated by them.

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Secondly, There is no equity for a settlement at present; Mrs. *Austen's* interest not being immediately reducible into possession: if it were reversionary, it could not be settled, *Osborn v. Morgan (a)*. Here, though it is not reversionary, it is not payable till a future period, when Mrs. *Austen* may be entitled to the whole, by surviving her husband. The case falls within *Osborn v. Morgan*.

Mr. *Baily*, in reply, left the question for the Court.

The VICE-CHANCELLOR:

The principal question in this case is, whether, on the construction of the will of *Joseph Taylor*, the trustees are authorized or required to make a settlement on the Defendant, Mrs. *Austen*. [His Honor read the clause of the will, giving the property to the trustees for his daughters, and proceeded:]—This is a gift to the daughters, vesting the interest in them immediately, but postponing the period of payment till they attain twenty-one, or marry under that age with consent. Then there is a proviso, specially addressed to the case of the daughters marrying with consent; and if they marry with consent, the trustees may either pay them their shares immediately, or, at their discretion, settle them, and the will points out what sort of settlement the testator desires. Now, that proviso is exclusively confined to the case of the daughters marrying *with consent*. It does not appear to me that I can import into it a proviso, that if the daughters marry *without consent*, the trustees are to have that power. However

(a) 9 Hare, 432.

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unusual, however absurd even, the testator's expressed intention may be, I cannot alter the will and put in a clause authorizing a settlement in any other event than that which he has expressly pointed out; on attaining twenty-one Mrs. *Austen* will be entitled to have the property (to the whole of which it seems she has, by survivorship, acquired a right) paid to her.

[His Honor then referred to the clause limiting the shares of the daughters over to the survivors of them, and proceeded:]—Now, whether in this clause “unmarried” means without having been married, or simply discover, or whether it means married with or without consent, it is not necessary to determine. It does not, in my opinion, in any view of it, alter the effect of the previous clause, so as to give power to the trustees to settle, except on a marriage with consent, that which is given by the will. [His Honor referred to the ultimate limitation to Mrs. *Paine*, and observed, that whatever might be the construction to be put on the word “unmarried,” or on the words “without leaving such issue as aforesaid,” questions which it was at present unnecessary to determine, he did not find in that clause anything to control the effect of the language of the first proviso, and to enable him to say that the trustees had now a power to direct a settlement, and proceeded:]—If the Defendant, Mrs. *Austen*, were now entitled in possession, the question, whether there should be now any settlement, might arise; but she is not so entitled, and the husband does not so claim it. He says she will be entitled in possession on attaining twenty-one, and not till then; and then will be the time to consider the question of her equity for a settlement.

I am of opinion that I cannot now direct a settle-

ment, or any inquiry into the circumstances of the marriage, or whether there is any other settlement on the lady, or whether she has any other property. All that I can do now is to direct the usual accounts to be taken.

A common decree for accounts was accordingly taken.

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IN THE MATTER OF THE WINDING-UP
ACTS, AND OF THE LONDON CONVEY-
ANCE COMPANY.

EX PARTE WISE AND OTHERS.

THIS was a petition of four of the shareholders in the London Conveyance Company, praying for a winding-up order. The company was formed in 1836, for running omnibuses, &c., under a deed of settlement, and it had carried on business from the year 1836 down to the time of the petition being presented. The capital of the company consisted originally of 50,000*l.* in 5000 shares of 10*l.* each, the whole of which had been long since paid up. It appeared that, for some time past, the business of the company had not been profitable. In October, 1852, the directors of the company sold to another omnibus association the stock of the London Conveyance Company for a sum of 9500*l.*: of this 9500*l.*, 6500*l.* were

1853:
11th and 12th
March.

*Winding-up
Acts,
what comes
within them.*

A winding-up order is not to be made of course, because a company is within one of the eight classes described in the 5th section of the Act, but it is for the Court to judge of the necessity or expediency. And where a company was insolvent, but there was an arrangement pending,

by which the admitted debts would be cleared by a subscription among the shareholders, and there were no other questions except equities between the shareholders, the Court refused a winding-up order on the petition of a few shareholders holding very few shares.

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paid to the bankers of the company, in discharge of advances made by them to the directors of the company. That these monies had been applied by the directors to the use of the company was not disputed; but it was disputed whether they had any authority so to borrow the money, and whether, therefore, they had authority to repay the same out of the company's assets. It was admitted, however, that after such payment, and certain other payments, there was a clear sum of 1700*l.* of admitted debts of the company. It appeared by the evidence that a claim was made against the company by a Mr. *Hudson* for 800*l.*, and that he had commenced an action in respect thereof in January 1850, against certain of the shareholders of the company, but such action was discontinued in June 1850, and the Plaintiff paid the Defendants their costs. Mr. *Hudson* commenced a fresh action immediately afterwards against one of the shareholders, which, however, had not been proceeded with. On the 17th January 1853, a meeting of the company was held, when the accounts were presented, and immediately after the termination of that meeting an extraordinary general meeting was held, for the purpose of taking into consideration the necessary steps to be adopted for liquidating the debts of the company. At that meeting a resolution was carried to the following effect:—That certain shareholders there present, eleven in number, and who owned together 1010 shares, agreed to pay 1*l.* per share, provided the remainder of the shareholders paid up the same amount, with a view to liquidate the debts of the company and wind up its affairs. On the 18th of January the secretary of the company, under instructions from the directors, forwarded to each of the shareholders who appeared on the register-book of the company, a copy of these resolutions, and the following circular:—

“ St. Alban’s Place, Paddington,
January 18, 1853.

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“ London Conveyance Company.

“ Sir,—I am instructed by the Directors to annex an extract from the minutes of the extraordinary general meeting of the shareholders of this company, held yesterday at the George and Vulture Tavern, St. Michael’s Alley, Cornhill, London.

“ If you are desirous of promoting the views of the meeting, the committee will feel obliged by your handing them an undertaking signifying that you are willing to pay 1*l.* per share on your shares before Thursday, the 27th instant, in order that they may precisely know at the earliest possible period how to deal with the creditors of the company, by whom any one of the shareholders may at present be sued.

“ The shareholders who have agreed to pay up this 1*l.* per share, together with Mr. *Dangerfield* (who, though not at the meeting, had previously acquiesced in the propriety of and agreed to act on such committee), represent a majority of shares. Should the committee find the support they expect from the remainder, they will be able at once to dispose of all the admitted claims on the company.

“ I am, sir, your most obedient Servant,

“ JOHN S. BAILEY, Secretary *pro tem.*”

At this time the number of shares in the company amounted to 2065, held by forty-two shareholders. Of these it was sworn that twenty-two, holding together 1600 shares, had agreed or had signified their consent to comply with the resolution of the 17th January; that of the remaining twenty shareholders, representing 465 shares, of which the four Petitioners held only 130, there was reason to believe all excepting the Petitioners would concur in car-

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rying out that resolution. It appeared that Mr. *Hudson* had made other claims against the company, and had commenced actions against some of the shareholders, but he had not actively proceeded with any, and the company denied the validity of his claims. A charge was made by the petition against the directors, in respect to the sale of the stock, that it had been fraudulently conducted. Of this there was some, but not satisfactory, evidence. There were other claims made upon the company by shareholders, in respect of monies advanced by them for the necessities of the company, but the validity of these claims was disputed as against the company.

On these materials the petition to wind up the company was brought on.

Mr. *Russell* and Mr. *Moore*, in support of the petition.

• Mr. *Glasse* and Mr. *Lewin*, *contra*.

They cited *James's case* (a), *Inderwick's case* (b), *Fisher's case* (c).

Mr. *Russell*, in reply, urged, among other things, that if a company was within any of the classes enumerated in the 5th section of the Act, it was a matter of right and not of expediency that any shareholders should have it wound up under the Act; that the Acts were expressly intended to provide facilities for the dissolution and winding up of companies, which was all but impossible in this Court; that if the difficulty was great when the rules of proceeding were known, it was much greater now under the new unsettled practice, and that to de-

(a) 3 De Gex & Smale, 127.

(b) Ibid. 231.

(c) Ibid. 116.

prive shareholders in such a company of the benefit of the Winding-up Acts, and to throw them back upon the impracticable course of a suit in this Court for contribution, would be substantially to deny all relief.

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The VICE-CHANCELLOR :

There appears to me to be considerable misapprehension as to the purpose of the Winding-up Acts. An objection has been taken in argument to the use of the term expediency, as applied to the consideration of the cases to which the Acts are applicable. But I find that to be the very term used by the Act itself, in the section which gives directions to the Court as to its mode of proceeding. The 1st section of the Act, after reciting various other Acts, has this recital: "Whereas it is expedient that further facilities should be given for the dissolution and winding up of joint-stock companies and other partnerships." The purpose of the Act is to give facilities for dissolving, &c. The 5th section points out the cases in which it is lawful to present petitions for winding up companies. It is only in those cases in which a petition can be presented at all. And eight such cases are stated; the 7th case is, "If the company shall have been dissolved, or have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up."

[His Honor referred to the 8th case, and proceeded:]—In any of these eight cases a party may present a petition. It is not that in every one of such cases an order must be made, but merely that a petition may be presented. Some of the following sections of the Act affect the course of proceeding, and then comes the 12th, by which the Court may, if it thinks fit, make an order *nisi*, or refer it to the Master to make preliminary inquiries as to the ne-

853.

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Wise.

cessity or expediency of the dissolution and winding up, or of the winding up of the company, and the Court is to see what it finds on the report relating to the necessity or expediency of winding up; and so the last passage of the section shows, by which the Court may make an order absolute if it appears by the Master's report that the dissolution, &c., is necessary or expedient; therefore, if it were referred to the Master to make inquiries, and the Master reported that it was necessary or expedient, the Court might at once make an order absolute; but if the Master reported that it was not necessary or expedient, then if the Court thought the Master right it would make no order; but because the Court may refer it to the Master to look into the question of necessity or expediency, is the Court therefore precluded from exercising its own discretion in the first instance? May not the Court judge at once for itself whether it is necessary or expedient? I am of opinion, that beyond all question the purpose of the Act was not to make it a matter of course that contributories showing a case to be within one of the eight classes of cases pointed out in the 5th section may ask, as of right, for a winding-up order, without showing that any benefit to the company would result from it.

It is not correct to say that when the Court in the exercise of its discretion refuses a winding-up order, it shuts the door of justice. What it does, is simply to tell the parties to seek justice in the ordinary course of the Court, and not under the special powers and provisions of the Winding-up Acts. I am of opinion that I am bound to exercise a judicial discretion on the question of the expediency or necessity of the case; and the question therefore is, whether, on the circumstances of this case, it is one in which it is necessary or expedient that a winding-up order should be made.

Now, this company is not within the class of inchoate associations ; it has been in active operation for several years ; the Petitioners are four in number, holding together about 130 shares ; the total number of shares was originally 5000 : it seems there are now only 2065 ; besides the four Petitioners, there are thirty-eight shareholders, respondents as it were to this petition, holding upwards of 1900 shares. It does not follow that because the Petitioners are greatly in the minority there can be no order, for it might be expedient ; still, the circumstance of their being in a minority is to be looked at. The first question in this, as in all such cases, is this : What are the liabilities to which the Petitioners in particular, and the shareholders generally, are exposed ? Are there demands against the company under which the Petitioners are liable to be called upon to pay more than the amount due from them in proportion to their shares ? It is true that when a company is being wound up, the proceedings are not merely for the discharge of debts of the company : they may embrace the administration of equities between the contributories ; but that is not the principal purpose of the Act. The object of the Act was not so much to administer the internal equities as between the shareholders, as to prevent one shareholder from being compelled to make a payment much larger than his proper share.

As to the debts to which the company is liable, they are admitted to be about 1700*l*.

It appears that certain shareholders have put their names to a memorandum, by which they have agreed to pay 1*l*. per share for liquidating the company's debts, if the other shareholders will do the same. The persons who have thus agreed hold 1010 shares. This transaction took place on the 17th January, and shortly after-

1853.

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Wise.

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wards this petition was presented, which of course prevented the operation of the resolution.

Besides these debts, it is said there are other claims. There is great difficulty as to those. Some of them are alleged to be claims by shareholders or directors in respect of advances made by them, which they claim to have repaid ; an action clearly cannot be brought against the company for those. Another class of debts is in respect of monies lent by other persons to the directors for the use of the company. Both the Petitioners and the Respondents say these are no debts of the company. At any rate, they are not the debts of the Petitioners, and they are the subject of a mere administration of equities between the shareholders ; the persons who are liable to pay them, may have a right to say that they are entitled to have repayment from the other contributories ; but that claim would be adverse to the claim of the Petitioners. With regard to the debts ultra the 1700*l.*, the case is not, as presented, in a condition in which I can say whether they are debts for the liquidation of which there ought to be contribution.

Then it is said, there are other grounds for winding up the company. First, it is said that the directors, having a large stock belonging to the company, have sold it at an under value, and under circumstances rendering the sale improper ; but if that were so, that does not require a winding-up order ; that is a question of equities between the parties. Except in a few special circumstances, there is for the purpose of administering such equities, no machinery more cumbrous or inconvenient than that of the Winding-up Acts ; and where there is nothing to be done beyond administering such equities, I do not think it at all expedient to apply the machinery of the Winding-

up Acts. The same observation applies to another allegation, viz. that the assets have been misapplied by the directors, that is, with reference to the repayment of the loans made by the Bank ; that is a question whether the directors duly exercised the powers vested in them : if they had power to make the company liable for the loan, they properly repaid a debt of the company ; if they had no such power, then they borrowed on their own credit, and applied the monies for the use of the company ; still that is a question whether they duly applied the assets. I do not at present see any ground for concluding that there was an improper sale of the stock, or an improper application of the proceeds. No such case is now established before me. But if it were, I should hesitate, unless there were existing liabilities of the company, to grant a winding-up order merely for the purpose of taking an account against the directors. It is clear that this petition has had the effect of preventing the operation of the resolution for raising money by subscription among the contributories ; and all that I shall do on this petition, is to let it stand over for a certain period, in order to see how far the resolution will have the effect of raising money, and in order to allow each party to bring affidavits to show what are then the existing liabilities of the company.

The petition stood over until the first day of Easter Term.

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PENNEY v. GOODE.

1853:
14th January.

Practice.
Production.
Deeds and
Papers.

Motion for production of documents belonging to a company, against Defendants, who had been, but were no longer, trustees of the company, no other shareholders being parties. The answer admitted the documents to be in the office of the company, but not otherwise in the possession or custody of the Defendants. Held, that production could not be enforced.

IN this case the bill was filed by *Henry Penney* against *Goode, Burchell, and Bailey*, who were the treasurers and trustees, and also members of the *Westminster Fire Insurance Society*. The Plaintiff was a varnish manufacturer, and had insured in the *Westminster Fire Office*, under a policy dated the 12th of *October* 1849, certain buildings and stock in trade used in his business, for the sum of 1875*l*. In *July* 1850, part of these buildings and the stock contained therein were destroyed by fire. And the bill was to have the amount at which these things were insured paid to the Plaintiff.

The office refused to pay the amount claimed, without being first furnished by the Plaintiff with an inspection of his books and other vouchers and evidence, pursuant to the 12th condition of the policy; and this the Plaintiff refused, on the ground that his method of manufacturing was a secret, and his books would disclose such secret. The 12th condition of the policy was as follows:—"All persons insured who shall sustain any loss or damage by fire, shall forthwith give notice thereof at the office of the society, and within fifteen days after such fire deliver in the particulars of the loss and damage sustained, in the most satisfactory manner that the nature of the case will admit of; and shall, if required, verify the same by their oath or affirmation, and by the oath or affirmation of their shopmen, domestics, or servants, by their books of accounts and such other proper vouchers as shall be reasonably required in that behalf; and unless such notice shall be given and (if required) such affidavit of the insured's loss

made, and such books and vouchers produced, no money shall be recoverable by virtue of any policy to be issued by this society; and if it shall appear that there hath been any fraud or false swearing, or that the fire shall have happened by the procurement or wilful act, means, or contrivance of the insured or claimants, he, she, or they shall forfeit and lose every right and claim to restitution or payment by virtue of his, her, or their policy or policies; but in case any difference shall arise between this society and the insured, touching or concerning any loss or damage sustained, such difference shall be submitted to the judgment and determination of two arbitrators to be indifferently chosen, one to be named by the insured, and the other by the directors of this society; and in case such two arbitrators cannot or shall not agree, then the same shall be submitted to and determined by a third person to be chosen by such two referees or arbitrators as an umpire, and the award in writing of such two referees or their umpire shall be conclusive and binding upon all parties."

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v.
GOODE.

This was the substantial question in the suit. The bill alleged that the Defendants were the only parties necessary, and contained the usual inquiry for books and papers; and by their first answer the Defendants, admitting that they were treasurers and trustees of the society, said they believed there were at the office of the said society, but not otherwise in their possession, custody, or power, &c., the deed of settlement in the bill mentioned, and the several letters in the bill mentioned, and divers other documents, of which, for reasons stated, they submitted they were not bound to set forth any schedule.

Afterwards a further answer was put in, by which they did set forth a schedule of these documents.

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The bill was afterwards amended, and by the answer to the amended bill, the Defendants stated that they were no longer treasurers and trustees of the society, but that certain other persons whom they named, were such treasurers and trustees.

A motion was now made by the Plaintiff for production of the deed of settlement, and of the documents mentioned in the schedule of the further answer. The Defendants offered to allow inspection at their own office, but objected to produce them elsewhere, on the ground of inconvenience : the offer was refused.

Mr. *Terrell*, in support of the motion, cited *Glynn v. Caulfield* (a), and *Reid v. Langlois* (b).

Mr. *Walford* (with whom was Mr. *Malins*), cited *Taylor v. Rundell* (c), and *Murray v. Walter* (d).

Mr. *Terrell*, in reply.

The VICE-CHANCELLOR held, that the Plaintiff was not entitled to production of the documents. He said, that if the Defendants had been actually the trustees, still it did not appear by the answer that they had any power to take the documents out of the custody of the general body of directors. But it appeared they were no longer the trustees ; other persons were as much entitled as they were, to say whether the documents should be produced or not ; and if the Court made the order asked, it must, to enforce it, commit the Defendants for not doing, that which they had no power of doing without the consent of other persons who were not before the Court. The motion was refused with costs.

(a) 15 Jur. 807.

(b) 1 Mac. & G. 627.

(c) Cr. & Phil. 104.

(d) Cr. & Phil. 114.

RICHARDSON v. JENKINS.

THIS was a creditors' suit, for the administration of the estate of *James Robertson*; and it now came on to be heard on further directions.

Robertson had misapplied several trust funds, and the questions arose between the several *cestuis que trust*, who claimed as creditors against his estate. The Plaintiff claimed under a deed by which certain property had been vested in *Robertson* on trust for sale; this deed contained such a declaration of trusts, as clearly created a contract by *Robertson*; but he had never executed it: he had, however, acted under it; he had sold the property, and received the money produced by the sale.

Davis, another creditor, claimed under two deeds, both of which were executed by *Robertson*.

The language of both of these deeds was, that *it was declared* that *Robertson* should stand possessed, &c., of the trust funds; but they did not contain the word "agree," and under one of them there were two trustees, *Robertson* and *Snell*. *Snell* survived *Robertson*.

Another creditor, *Nicholson*, claimed as a creditor by bond, in which the heirs were expressly bound.

The questions were, whether, Firstly, the Plaintiff was a specialty creditor; Secondly, whether, in *Davis'* case,

specialty creditor under a security in which the heirs are not expressly named.

1853:
26th April.
Debtor and Creditor.
Specialty Debt, what creates.
Trust deed, effect of non-execution of.
Bond Creditor.

A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it.

The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts &c. is sufficient.

A creditor by bond, in which the heirs are named, takes priority over a

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the obligation did not survive to *Snell*, and whether, therefore, *Robertson's* estate could be sued; and Thirdly, whether *Nicholson* had not priority over the others, as against *Robertson's* real estate.

Mr. *Selwyn* and Mr. *C. P. Philips*, for the Plaintiff.

There is clearly a specialty contract created by the terms of the deed under which we claim; but it is said that because *Robertson* did not execute it, there is no specialty debt. But if *Robertson* were living, he clearly could not be heard to set up such a defence, having acted as trustee under the deed; nor can any person claiming under him. In *Lord Montford v. Cadogan (a)*, Lord *Eldon* says, "It is said the trustees are not under covenant, and they are not bound under hand and seal. But they have in equity undertaken to execute the trusts, exactly as if they had so executed the instrument, and the general words 'it is declared and agreed,' &c., amount to a covenant."

In a case in 3 Carr. & P., p. 459, *Hawkins v. Sherman*, Lord *Tenterden* threw out an opinion, that where there had been an assignment of a lease, not executed by the assignee, an action of covenant was the proper action to be brought by the assignor for breach of a covenant.

They cited also *Wood v. Hardisty (b)*, *Turner v. Wardle (c)*, and *Platt on Covenants*, pp. 10 and 18.

Mr. *Speed*, for *Davis*.

Davis is clearly a specialty creditor. In both the deeds under which he claims, there is a declaration that

(a) 19 Ves. at p. 638.

(b) 2 Col. 542.

(c) 7 Sim. 80.

the trustee shall stand possessed on trust ; that is a declaration by the trustee, which creates a contract : it is not necessary that there should be the word " covenant " or the word " agree." *Mavor v. Davenport (a), Turner v. Wardle (b).*

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The Plaintiff is not a specialty creditor. *Adey v. Arnold (c)* shows that there is no specialty created by a simple breach of trust, and that is all that there was in this case, *Robertson* not having executed the deed. True he was a trustee, and could not have escaped liability ; but he was only a debtor by simple contract, and his creditors can be, as against others, no more.

Mr. Shapter, for *Nicholson*.

Nicholson must clearly take priority over the other creditors, as against the real estate, because in his security the heirs are in terms bound, while they are not so in the securities of the other creditors. The 3 & 4 Will. IV. c. 104, expressly reserves the priority of specialty creditors where the heirs are bound. He cited also *Cummins v. Cummins (d)*.

Davis, in respect of the deed of which *Snell* was a trustee, has no claim ; the obligation survived to *Snell*, and *Robertson's* estate cannot be sued at law on the contract. In this Court he has no claim except for his legal debt, *Richardson v. Horton (e)*.

Mr. Selwyn, in reply.

The execution of the deed is not in all cases necessary

(a) 2 Sim. 227.

(d) 3 Jones & Lat. 64.

(b) 7 Sim. 80.

(e) 6 Beav. 185.

(c) 16 Jur. 1123.

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to support an action of covenant; and if an action of covenant can be maintained, there is a specialty debt. Take the case of an action of covenant by the reversioner against the assignees of a lease: such an action would clearly lie, though the assignees had not executed the deed. If the language of a deed is such as would create a specialty, a party acting under it brings himself within the specialty.

Hawkins v. Sherman shows that it is not merely when the covenant runs with the land, that an action of covenant will lie, though there has been no execution of the deed. *Adey v. Arnold* does not bear on the question: it decides that there must be an agreement, but does not touch the question of the effect of non-execution.

The VICE-CHANCELLOR :

In this case five points arise.* The first relates to the debt due to the Plaintiff. It appears that a trust deed was executed by which certain property was conveyed to *Robertson* on various trusts, one of which was a trust for sale, and he was to stand possessed of the proceeds on trusts, which it is not necessary minutely to mention. *Robertson* was a party to the deed and acted under it, but did not execute it; and the question is, whether that instrument, not being under the seal of *Robertson*, amounts to a contract on his part, so as to make his debt a specialty debt: a question which resolves into this, whether in such a case an action of covenant would lie at law. Now the circumstances of this case, and the

* The Reporter has only thought it material to report the judgment on the four first points. The fifth related to the question of costs, and turned on the particular course of conduct adopted by the Plaintiff.

authorities cited in it, have brought to my recollection that when I was Master, the same question came before me, and these authorities, *Lord Montford v. Lord Cadogan* and the others, were cited; and as to the case of *Wood v. Hardisty* entertaining doubt whether the decision went on the point of absence of execution of the deed, I caused the registrar's book to be searched, and ascertained that the trustee had sealed the deed. In the case then before me, I decided that the debt was not a specialty debt. Of course I cannot treat my own decision, as Master, as an authority. But it appears to me now, as it did then, that it is difficult to comprehend how, except in a very few exceptional cases, a man can be liable as on a specialty debt, under an instrument not sealed by him. There may be cases of exception, as by the custom of *London* or by other custom, but such cases stand on the special custom. So in the case of a covenant running with the land, that stands on its own special ground, and is an exception to the general rule. As a general rule, a man cannot be bound as a specialty debtor, except by some instrument under his own seal; he cannot be bound as in a specialty by covenant, unless by an instrument under his own seal he has agreed to do something. If I found any authority deciding that acting under a deed, though not sealed by the party so acting, would render him liable as on specialty, I should be bound by it. If the case of *Wood v. Hardisty* had so decided, I should follow it. But I do not think that case, or any of the cases cited are applicable. *Lord Montford v. Cadogan* was a case in which the question was, not whether the trustee not having sealed the deed, was liable as on specialty, but whether, not having executed, he would be liable under the terms of the deed. The language of Lord *Eldon* is somewhat ambiguous; but though he uses the term "covenant," his

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mind clearly was not addressed to that point. As to the case of *Wood v. Hardisty*, from examination of the registrar's book, it appears clear that the trustee there had sealed the deed, and the question was, whether the language created a contract; the only case in which I find any authority is *Hawkins v. Sherman*, in which Lord *Tenterden*, though he does not expressly decide the point, intimates a doubt; but it is only a doubt (a).

But supposing an action of covenant could be brought in that case, where a prior lessee has covenanted, and has then assigned his lease in such a manner that the assignee is under an obligation, the decision would only go the length that in that particular case an action of covenant would lie. *Adey v. Arnold* does not decide the point. Under these circumstances I am bound to decide on principle, and to hold, there being no authority to the contrary, that the want of sealing the deed by the party, prevents his debt being a debt on specialty. I am of opinion, therefore, that as to the debt due to the Plaintiff, it is a simple contract debt merely.

The second question is this. *Davis* is a creditor under two deeds, of one of which *Robertson* is sole trustee; *Robertson* did execute the deed; the only question then upon this deed is, whether in form it is sufficient to constitute a contract; if there is a contract, *Robertson*, having sealed it, is a specialty debtor. The terms of the deed are "it is declared," &c.; and the question is, whether that amounts to a contract on the part of the trustee. On this point *Adey v. Arnold* was cited; and if Lord *St. Leonards* had decided in that case, that, to constitute

(a) See also *Burnett v. Lynch*, 5 Barn. & Cress. 589, collected that in such a case an action of covenant would from which it is rather to be not lie.

a contract, it is necessary to have the word "agree," I should of course follow his decision. But he has not so decided. All that was decided in *Adey v. Arnold* is, that if there is nothing more than a conveyance on trust, that does not amount to a contract. And I am of opinion that when the parties to a deed, frame it in the terms of *declaring* that such and such things shall be done, the term "declare" is sufficient to constitute a contract. The case is the same as to the deed in which *Robertson* and another are the trustees. *Davis*, therefore, stands as a specialty creditor.

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v.
JENKINS.

The third point is this. Under one of the deeds, *Robertson* was not sole trustee, but only jointly with one *Snell*. *Robertson* is dead, leaving *Snell* surviving him; and it is contended that though there is a contract under seal by *Robertson*, the obligation was joint, and that it survived to *Snell*, and lies on him and not on *Robertson's* estate; and *Richardson v. Horton* was cited on this point; the argument, however, assumes that the obligation was joint; but I think it was joint and several.

The fourth point is this. *Nicholson* is a creditor by bond under seal, in which the heirs are bound; and he claims to be paid first out of the real estate. Now the liability of *Robertson* under the deed which he executed to *Davis*, though a liability by specialty, is not one which binds the heirs; and the terms of the Statute (3 & 4 Will. IV. c. 104) are clear. *Nicholson* is therefore entitled to be paid out of the real estate, in priority over *Davis*.

1853:
25th May.

*Winding-up
Acts.*

Contributories.

THE DOVER AND DEAL RAILWAY COMPANY.

EX PARTE THOMAS HIGHT.

A. was a member of the provisional committee of a projected railway company, and at a meeting thereof joined in appointing solicitors and engineer, and immediately afterwards a committee of management was appointed. *A.*'s name was put on this without his knowledge. He never acted in any further or other way. Expenses were incurred by the solicitors and engineer subsequently to the formation of the managing committee, and by their direction; it did not appear that any other expenses had been incurred: Held, that *A.* was not a contributory.

THIS case arose in the course of winding up the same company in which the cases of *Ex parte Beardshaw (a)*, and *Ex parte Mowatt (b)*, and *Ex parte Mowatt (c)*, on appeal, were decided. The facts as to the formation of the company and the negotiations of its directors with the South Eastern Railway Company will be found in the reports of those cases. The particular facts material in this case are as follow:—

Mr. *Hight* was a member of the provisional committee, and his name appeared as such in the printed prospectus issued. He attended a meeting of this committee on the 24th of October 1845. At that meeting, the title and capital of the intended company, the number of shares, the amount of the shares, and the amount of the deposit were fixed upon, and the solicitors, Messrs. *Hook and Thompson*, were appointed. The bankers were also named, and the acting engineer was appointed, and it was resolved that he should forthwith proceed to survey the line. Nothing further was done at this meeting, and Mr. *Hight* never took any further part in the active management of the company.

On the 1st November 1845, a managing committee was appointed, of whom Mr. *Hight* was one, and his

(a) 1 Drew. 226. (b) 1 Drew. 247. (c) 17 Jur. 356.

name appeared as such in the printed letter, dated the 24th January 1846, containing the guarantee of the directors, referred to in *Ex parte Mowatt* (a).

1853.
Ex parte
 HIGHT.

Mr. *Hight*, on being examined before the Master, proved that he never had notice of his being put on the managing committee, and that he never saw his name advertised as a member of it in the public papers; and there was no evidence to contradict this. The solicitor, Mr. *Hook*, being examined before the Master, proved that he acted regularly as the company's solicitor from the date of his appointment, and attended the meetings of the committee of management as such solicitor. That considerable expenses were incurred in the surveys and in the parliamentary expenses of the company. That such expenses were incurred by the direction of the committee of management; and from the evidence generally, it appeared that nothing substantial was done till after the formation of the committee of management.

Mr. *Hight* did not execute either the parliamentary contract or the subscribers' agreement.

Under these circumstances the Master had put Mr. *Hight* on the list of contributories, and this was a motion by way of appeal to take his name off the list.

Mr. *J. Baily* and Mr. *Hobhouse*, for the motion.

They relied on *Carrick's case* (b).

Mr. *Glasse* and Mr. *Selwyn* for the official manager.

The VICE-CHANCELLOR:

I am of opinion, on the authority, and solely on the

(a) 1 Drew. 247.

(b) 1 Sim. N. S. 505.

1853.

Ex parte
HIGHT.

authority, of *Carrick's case*, that Mr. *Hight's* name must be struck off the list. [His Honor referred to the circumstances of that case, and the language of the Court.] It appears to me that this is precisely the same case. As far as appears by the evidence, as to the authority to incur any expenses, it is shown that expenses were incurred by special directions of the managing committee, but not by virtue of the general appointment of solicitors and surveyors; there is nothing to show that under or by virtue of the general authority for their appointment, any expenses were incurred by them, which are either now unliquidated, or in such a position, that any other person can call on Mr. *Hight* in respect of them. For these reasons, I think there is no sufficient ground for putting Mr. *Hight's* name on the list.

WAYN v. LEWIS.

IN a suit by a second mortgagee against the first and subsequent mortgagees, to redeem the first mortgagee, and foreclose the equity of redemption, a petition was presented by the Plaintiff, under the 48th section of the Chancery Improvement Act, for a sale instead of foreclosure.

For the petition, Mr. *Hetherington*.

Mr. *T. Stevens*, for the puisne incumbrancers, said there had been a decree for an account, and to ascertain priorities, before the Act; in that state of things the Court had no power to direct a sale; it might be for the benefit of the subsequent incumbrancers to redeem rather than to have a sale, and the Act never meant that the first mortgagee should have any such advantage as between him and other incumbrancers, but only as against the mortgagor.

Mr. *Hetherington* replied.

The VICE-CHANCELLOR :

The question here is, whether the Act intended that a direction for sale might be given on an interlocutory application, or whether it meant to provide only, that at the hearing, a decree for sale instead of foreclosure, might be made. It is clear that before the Act no order for foreclosure could be made on an interlocutory application. Then the Act says, the Court may decree a sale instead of foreclosure. If it could not make an order for

1853 :

6th May.

Practice.
Sale instead of
Foreclosure,
under 48th sect.
of the Chancery
Improvement
Act.

The Court has no power to order a sale under the 48th sect. of the Chancery Improvement Act, on interlocutory application, but only where, before the Act, foreclosure might have been decreed.

1853:

WAYN

v.

LEWIS.

foreclosure, it cannot make an order for sale, which is merely substituted for foreclosure. That is my view of the construction of the Act, and if no authority to the contrary can be produced, I must refuse the application.

1853:

31st May,
& 4th June.

affirmed.
3d, 4th, 32d.

Dower.

Election.

Will.

Construction.

Vesting.

PARKER v. SOWERBY.

THIS cause came on on further directions. The testator was seised of real estate, and possessed of personal estate, and he made his will, dated the 15th August 1833, which, so far as is material, was as follows:—

Testator devised his real estate to trustees, with power to "let," until all his nephews and nieces should attain twenty-one. And after his youngest nephew or niece should be of age, then he directed his estates to be sold, and the produce to go amongst all his nephews and nieces, except two by name. He charged his rents with an

annuity to A. and with payment of bond debts, but did not otherwise dispose of them. Held, first, the widow was put to her election; secondly, the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale.

I constitute and appoint my wife, *Sarah Monkhouse*, sole executrix of this my last will and testament. I bequeath unto her all my personal property, whatsoever or wheresoever, to her own use entirely, and all rents, or arrears of rent due to me at the time of my death, I give unto her to pay all my small debts, testamentary and funeral expenses. I give and bequeath unto *John Pollock*, son of *Thomas Pollock*, of *Shields*, my nephew and heir-at-law, all my estate at *Low Braithwaite*, in the parish of *Hesket*, and county of *Cumberland*, he paying unto my wife 40*l.* a year from the said estate during her natural life; and I do also hereby nominate and appoint *Joseph Sowerby*, of *Carlisle*, gentleman, *John Simpson*, of *Beacon Hill*, husbandman, and *William Scott*, of *Micklethwaite*, farmer, joint trustees, under this my last will and testament, unto whom I give full power to act in conformity to this my said will. All my estate at

Sowerby Row, in the parish of *Castle Sowerby*, and my estate at *Longlands*, in the parish of *St. Mary Without*, I give into the hands of my trustees, to have power to let the same till all my nephews and nieces be of the age of twenty-one years. I give and bequeath unto my sister *Margaret Parker* 10*l.* a year to be paid her in addition to the 4*s.* a week left her by my father *Isaac Monthouse*, during her natural life, the other part of the rents to pay my just debts, should any bonds or notes stand against me at the time of my death ; then, after the youngest of my nephews and nieces is of age, then my will is, that the estates be sold by my trustees to the best advantage, and the price thereof to go equal, share and share alike, amongst all my nephews and nieces, *Joseph Parker* and *John Pollock* excepted ; should *Margaret Parker* be living, then my trustees to secure her 20*l.* a year during her life, and after her decease to be divided as above ; my trustees to take to themselves reasonable expenses for their trouble ; no wood to be cut or sold but what may be wanted for necessary repairs of the buildings, which I leave to the discretion of my trustees ; if my wife should have a child or children by me, born after my decease, this will is of no effect, as such child will be heir to all I have, and if more than one, share and share alike.

1853.
PARKER
v.
SOWERBY.

The testator died in 1837, and his will was duly proved by his widow.

The first question was, whether the widow was entitled to her dower out of the *Sowerby Row* and *Longlands* estates, the trustees having received the rents, and paid one-third to the widow in respect of her dower. She died in February 1847, leaving *Hetherington*, one of the Defendants, her representative.

1853.
 PARKER
 v.
 SOWERBY.

The Plaintiffs were *Elizabeth Parker*, who was the youngest of the testator's nephews and nieces, and attained her age of twenty-one in 1849, and other nephews and nieces or those claiming under them.

The bill was filed against the trustees, making others of the nephews and nieces Defendants, for administration of the testator's estate, and it sought to charge the trustees with the payments made by them on account of dower.

The Master to whom the cause had been referred had taken a distinction between an ordinary power to lease, and the powers contained in this will, and was of opinion that the widow was not excluded from her right to dower.

Mr. *Glasse* and Mr. *Murray*, for the Plaintiffs, relied on the power to lease, as clearly putting the widow to her election. The Master had distinguished between a power to let and a power to lease. There was no ground for such a distinction.

They cited *Gibson v. Gibson* (a), *Hall v. Hill* (b), *Grayson v. Deakin* (c), *Lowes v. Lowes* (d), *Roadley v. Dixon* (e), *Holditch v. Holditch* (f).

Mr. *Bagshawe*, jun., for some of the Defendants claiming against the widow.

Mr. *Taylor* and Mr. *Fleming*, for other Defendants in the same interest.

- | | |
|-----------------------|-------------------|
| (a) 1 Drew. 42. | (d) 5 Hare, 501. |
| (b) 1 Dru. & War. 94. | (e) 3 Russ. 192. |
| (c) 3 De G. & S. 298. | (f) 2 Y. & C. 18. |

Mr. *Bagshawe*, sen., for *Sowerby*, *Simpson*, and *Scott*, the trustees.

1853.
PARKER
v.
SOWERBY.

First, The testator makes his wife his executrix, and gives her his personal estate to pay his *small* debts; he gives the property at his decease to *T. Pollock*, charged with 40*l.* a year in favour of his widow. What is there in this will to show that the widow is not to take her dower out of the *Sowerby Row* and *Longlands* estates?

In *Hall v. Hill* the whole property was comprised in the devise on which the question arose. In that case, the decision did not turn on the power to lease merely. In order to put a widow to her election you must show a clear intention to exclude her. Now the testator gives *his estate* at *Longlands* and *Sowerby* to the hands of his trustees; that is, the estate that he had power to deal with, not the whole estate in the land; but the estate less the widow's estate in her dower; the power to let, is to let subject to the dower. Besides, this is, as the Master has held, not a strict power to grant leases inconsistent with the receipt of dower, but a power to let from time to time.

Mr. *Rasch*, for the representatives of the widow.

The whole question is, Is there a clear expression of intention that the widow shall be excluded? *French v. Davies* (a).

There is really nothing in the power of letting inconsistent with the widow's enjoyment of dower. *Hall v. Hill* assumes that dower can only be satisfied by setting it out by metes and bounds. But *Hall v. Hill* was not decided on the power of leasing alone. [He cited *Dowson v. Bell* (b), *Harrison v. Harrison* (c).]

(a) 2 Ves. jun. 572.

(b) 1 Keen, 761.

(c) Ibid. 765.

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v.
SOWERBY.

Mr. *Bovill*, for other parties.

Mr. *Glasse* was not called upon to reply.

The VICE-CHANCELLOR :

I quite adhere to the general propositions laid down by me in *Gibson v. Gibson*, and if I were not bound by decision, if the question were *res integra*, I do not think I should adopt the conclusion to which in the present case I am obliged to come ; but in questions of this sort I am not justified in departing from the result of established cases.

In all the decisions, the general rule recognised is, that it is not sufficient to collect an intention that the testator does not mean his widow to have her dower, but you must find an intention so to dispose of his estate that her claim to dower would be inconsistent with that disposition.

In working out this principle, on the question whether here there is a sufficient indication of intention, much has been urged in argument, which, if the matter were *res integra*, would make a great impression on my mind.

But a long series of cases has decided, that though a devise to trustees on trust for sale, is not inconsistent with the widow's right to dower ; yet a devise on trust to manage or to lease, does indicate an intention so to dispose of the estate, that the widow's enjoyment of dower is inconsistent with it. The cases deciding that, are too numerous for me to say that that is not the law. If, then, the devise is here to trustees, either with *power* to lease, or on *trust* to lease, I am bound to follow the decisions. Now, without at present adverting to the question, whether there is any distinction between a

power to lease expressed in technical language, and a power to let as here expressed, the power here is to let until the youngest of the nephews and nieces shall attain twenty-one: not a power to let during a specified period. And it is argued, that events might have happened so that all the nephews and nieces would have attained twenty-one before the death of the testator, and the power of letting would never have arisen; but I think that cannot be looked at in considering what was the intention.

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v.
SOWERBY.

Then the remaining question on this point is, Whether there is any such distinction as that which the Master has taken, between an ordinary power to lease, and the power to let contained in this will. I am of opinion there is no such distinction; a power to lease and a power to let are equivalent. (The Vice-Chancellor referred to the definition of a lease, in *Shepherd's Touchstone*, Vol. I. chap. 14, p. 266.)

Then it has been argued that the benefit given to the widow by the will, is not out of the property in which she claims dower; but the rule of law is, that if a testator has devised any part of his real estate, so that the claim of dower is inconsistent with carrying into effect the testator's whole intention, she is put to her election. I am therefore of opinion that in this case the widow is put to her election.

The second point raised in the case, was between nephews and nieces who had attained twenty-one, and were living at the time when the youngest attained twenty-one, and the representatives of nephews and nieces who had died under twenty-one, before that period, or having attained twenty-one, had died before that

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v.

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period ; the question was whether the latter took vested interests.

Mr. *Bovill*, for some of the parties, contended that those who were not living at the time when the youngest attained twenty-one, were excluded ; at any rate, those who had died under twenty-one, and before that period, took no vested interests. (He cited *Beck v. Burn* (a), Will Ex. 1051, n.) Here the fee is given to the trustees ; there is no immediate gift to the nephews and nieces. There is no gift till the period of sale, and then the gift is of personalty. The thing given, therefore, did not exist till the youngest attained twenty-one. The postponement is not for any convenience of the estate, as in the case of prior life estates. Here there are no such estates, and nothing to which the postponement can be attributed, except an intention not to vest the interests.

Mr. *Taylor*, for parties in the same interest.

Mr. *Bagshawe*, jun., for nephews and nieces who attained twenty-one, but died before the period of sale.

If the postponement of the gift is for the convenience of the estate, and not with reference to the devisee, it is clear it does not prevent vesting, 1 Jarm. 576, *Leaming v. Sherratt* (b). A trust is here created for the management of the estate, until the youngest nephew or niece shall attain twenty-one. An annuity and debts are charged on the rents.

Mr. *Glasse* and Mr. *Murray*, for other parties, declined to argue the point.

Mr. *Fleming*, for other parties.

(a) 7 Beav. 492.

(b) 2 Hare, 14.

Mr. *Bovill*, in reply.

The argument on the doctrine of the postponement of a gift, for the convenience of the estate, does not apply here, for there is no ground for saying that here the postponement is for any purpose connected with the convenience of the estate. An immediate gift of a vested remainder would have been quite consistent with the due execution of all that is directed to be done in the meantime, viz., the letting the land, and the satisfaction of the annuity and debts. The postponement is therefore with reference to the donee. Besides, here the rents, during the minority of the youngest nephew or niece (subject to the annuities and debts), are undisposed of, and descend to the heir: that is not consistent with the immediate vesting of the remainder in the nephews and nieces. At any rate, those who did not attain twenty-one could not take vested interests. That is decided by *Leaming v. Sherratt*.

1853.
PARKER
v.
SOWERBY.

The VICE-CHANCELLOR:

Assuming that both of the nephews and nieces who died before the period of sale attained twenty-one, I am of opinion that they are not excluded. This is a gift of real estate; it is given to trustees in fee, and they are to have power to let till *all* the nephews and nieces of the testator shall have attained twenty-one. The testator is there speaking of all the nephews and nieces whom he should have at the time of his death. He gives to *Marta Parker* 10*l.* a year to be paid out of the rents, and the other part of the rents he directs to be applied in payment of his debts. Then after the youngest of his nephews and nieces shall have attained twenty-one, he directs his estates to be sold, &c. (The Vice-Chancellor referred to the particular language of the will.)

1853.

PARKER

v.

SOWERBY.

And then he directs, that if *M. Parker* should be living, she should have 20*l.* a year. Now if this were a limitation of the estate to the nephews and nieces, it appears to me it would be a vested interest in them, notwithstanding dying before the period fixed for sale and distribution ; and it appears to me that the testator has only directed a sale, for the convenience of division.

Besides, I think there is this further reason for coming to this conclusion, viz. : that the testator, by excluding two of his nephews and nieces by name, shows himself, that except those two, he intended all his nephews and nieces to take. No doubt if a bequest is in these terms : " I desire that after a certain period my estate shall be sold," &c., the postponement not being for the convenience of the estate, the legatee must survive the period if he is to take. But if the postponement is for working out the purposes of the testator with reference to the estate, the interest will vest immediately.

I am of opinion that upon the authorities generally, this is a vested interest in the nephews and nieces who attained twenty-one, whether they did or did not survive the period at which the sale is directed. But if any of them did not attain twenty-one, such nephews and nieces did not (on the authority of *Leaming v. Sherratt*) take any interest.

CANNOCK *v.* JAUNCEY.

THIS came on upon a summons adjourned from the Judge's chambers to the Court, for production by the Defendant *Chichester* of two deeds, one dated the 7th of July 1846, and the other dated the 25th of July 1846. The bill was filed by *Ann Cannock*, the wife of *S. Cannock* the younger, by her next friend, and *S. S. Collins*, against *W. Jauncey*, *F. Higgins*, *C. M. R. Chamberlain*, *J. A. Higgins*, *W. Chichester*, *S. Cannock* the younger, and other Defendants.

The case made by the bill was, so far as it is material for the decision on this summons, as follows :—

The Defendants, *F. Higgins* and *C. M. R. Chamberlain*, were in and throughout 1846 the solicitors of *S. Cannock* the elder and *S. Cannock* the younger. In 1846 *Cannock* the elder was entitled to certain real estate subject to incumbrances. *Higgins* and *Chamberlain* were beneficially interested in some of those incumbrances, and were solicitors for all the other persons interested therein.

1853 :
26th and 28th
May.

Practice.
Production of
Documents.

A. was a transferee of a mortgage for 4000*l.*, and claimed also under a judgment 880*l.* A bill was filed by a subsequent mortgagee to redeem the mortgage for 4000*l.*, and for payment of the Plaintiff's incumbrance in priority over the judgment debt. The bill alleged that *A.* had in his possession a deed of conveyance of the estate, in which was a recital that the judg-

ment debt had been paid off. *A.* admitted the possession of the deed, and set out a portion of it, by which it was recited that the judgment debt was paid off; but he said that in fact this was only done for the purpose of clearing the estate, and that he had taken an assignment of the debt. Held, that if he had not been a mortgagee, he must have produced the deed; and 4000*l.* having been paid to him, without prejudice to any question in the cause, held, that he could not set off 880*l.* of that as due to the judgment debt, but must be taken to be paid off as mortgagee, and therefore liable to produce the deed.

1853.

CANNOCK

v.

JAUNCEY.

It was arranged in 1846, at the instance of *Higgins* and *Chamberlain*, that *Cannock* the younger should purchase his father's property free from the incumbrances, for 6700*l.* Not having money of his own sufficient, *Higgins* and *Chamberlain* undertook to procure for him 4700*l.*, provided 2000*l.* could be procured by way of third mortgage, subject only to the 4700*l.*

The Plaintiff and another person since deceased, being trustees of a sum of 2000*l.*, advanced that sum by way of mortgage on the estates so purchased by *Cannock* the younger, on the faith of there being no other incumbrances upon them except the 4700*l.*, and the bill alleged that this was done in consequence of representations made by *Higgins* and *Chamberlain*. All the documents for these several securities were prepared by *Higgins* and *Chamberlain*.

The first mortgage for 4000*l.*, from *Cannock* the younger to *Jauncey*, was dated the 25th July 1846, and it recited a deed of the 7th July 1846, which was the conveyance by *Cannock* the elder and others to *Cannock* the younger. The second mortgage for 700*l.* was also dated the 25th July. The third mortgage for 2000*l.* to the Plaintiff and his co-trustee was dated also the 25th of July 1846.

The Defendant *Chichester* claimed to be interested in the mortgage for 4000*l.* He claimed also to be entitled to a certain judgment debt for 880*l.* on the estates which were charged with the mortgages for 700*l.* and 2000*l.*, but of prior date to those mortgages; which judgment debt had originally been vested in one *Elizabeth Higgins*, and had by transmission of interest become vested in *Chichester*.

The bill then stated various circumstances, and among others that the indenture of the 7th July 1846, to which *Chichester* and *Elizabeth Higgins* were parties, contained a recital in the words and figures or to the effect following:—"Whereas the said *S. Cannock* the elder has this day paid to the said *Elizabeth Higgins* the said sum of 880*l.* and all interest for the same, as she doth hereby admit and acknowledge." The bill alleged that the said deed of the 7th July 1846, "purported to show on the face of it, that the said *Elizabeth Higgins* had released the said judgment."

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CANNOCK
v.
JAUNCEY.

It then contained several charges, to the effect that the existence of the judgment debt had been purposely kept back by the Defendants *Higgins* and *Chamberlain*, on the occasion of the advance of the 2000*l.* by the Plaintiff.

The Plaintiff sought to redeem upon payment of the first and second mortgages for 4000*l.* and 700*l.*, and for payment or foreclosure in respect of the Plaintiff's mortgage for 2000*l.*, and to stay an action of ejectment which had been brought by the Defendants, to recover the property comprised in the mortgage deeds, and any other actions in respect thereof; in effect, to have the alleged judgment debt postponed to the Plaintiff's demand.

The answer of *Chichester* admitted the deed of the 7th July 1846, and stated with respect to it in substance as follows: "I have hereinbefore mentioned that the incumbrances upon the said estates and property, so as aforesaid sold by the Defendant *S. Cannock* the elder to the Defendant *S. Cannock* the younger amounting together to the sum of 7380*l.* principal money, being a sum considerably exceeding the amount of the said pur-

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v.

JAUNCEY.

chase-money for the same, but inasmuch as a portion of the amount of such incumbrances, viz., the sum of 1500*l.* so as aforesaid secured to me, and the sum of 880*l.* so as aforesaid secured to the said *Elizabeth Higgins*, was secured not only on a portion of the property, so as aforesaid sold to the Defendant *S. Cannock* the younger, but also on other property of the defendant *S. Cannock* the elder; and as to the said sum of 880*l.* by the judgment so as aforesaid entered up against the Defendants *S. Cannock* the elder and *S. Cannock* the younger, it was arranged in or shortly prior to the said month of July 1846, that I and the said *E. Higgins* should respectively join in conveying to the Defendant *S. Cannock* the younger so much of the property comprised in our respective mortgages as was purchased by him, and that I should receive out of the said purchase-money the sum of 1000*l.* only, part of my said mortgage debt of 1500*l.*, and should advance and lend to and on account of the Defendant, *S. Cannock* the elder, a further sum of money, which was ultimately fixed at 1332*l.*; and that, as a security for the repayment of the sum of 500*l.*, residue of the said sum of 1500*l.*, and the said sum of 1332*l.*, making together the sum of 1832*l.*, together with interest for the same, all the property comprised in the said mortgages to me, and the said *E. Higgins* respectively, except the property so as aforesaid sold to the defendant *S. Cannock* the younger should be conveyed to me by way of mortgage; and it was further agreed that the said judgment debt, so as aforesaid due to the said *E. Higgins*, should be assigned to me for securing the payment of the sum of 880*l.*, part of the sum so to be advanced by me as aforesaid. In pursuance of the aforesaid arrangement, I and the said *E. Higgins* were respectively parties to the aforesaid conveyance to the Defendant *S. Cannock* the younger, and joined in conveying such of the estates

comprised in our respective mortgage securities as were sold to the Defendant *S. Cannock* the younger; and by an indenture dated the 7th July 1846, and made between the Defendant *S. Cannock* the elder of the first part, the Defendant *S. Cannock* the younger of the second part, the said *James Boulter* of the third part, the said *Elizabeth Higgins* of the fourth part, the Defendant *J. A. Higgins* of the fifth part, the said *James Abell* of the sixth part, and me *William Chichester* of the seventh part, after reciting (among other things) the said indentures, (stating several indentures,) and that the payment to the said *E. Higgins* of the said sum of 880*l.* and the interest thereof was further secured by two judgments of the Court of Queen's Bench, at her suit against the Defendants *S. Cannock* the elder and *S. Cannock* the younger respectively, for the sum of 1760*l.*, and that such judgments were respectively duly signed and registered in the month of June, and the registers thereof were respectively numbered 3753 and 3754, and also reciting the payment of interest by the Defendant *S. Cannock* the elder to the said *James Boulter* and me *William Chichester*, in respect of our mortgages, and also reciting that the Defendant *S. Cannock* the elder had paid unto the said *Elizabeth Higgins* all interest which had become due upon her said security for the sum of 880*l.*, and that the Defendant *S. Cannock* the elder had then lately contracted with the Defendant *S. Cannock* the younger for the sale to him of the hereditaments called respectively *Taylors* and *Wineolls*, and the said cottages and gardens at *Elton*, for the sum of 6000*l.*, and that he the Defendant *S. Cannock* the younger had on the day of the date of the indenture now in statement, and at the request of the Defendant *S. Cannock* the elder, paid the sum of 1200*l.*, part of the said sum of 6000*l.*, unto the said *James*

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CANNOCK
v.
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v.

JAUNCEY.

Boulter, in satisfaction and discharge of all monies due upon his said securities, and that the said *James Boulter* had concurred in the absolute conveyance to the Defendant *S. Cannock* the younger, of the hereditaments sold to him as aforesaid. And after reciting that the Defendant *S. Cannock* the younger had on the day of the date of the indenture now in statement, and at the request of the Defendant *S. Cannock* the elder, paid the sum of 1000*l.*, part of the said sum of 6000*l.*, to me, in part of the said sum of 1500*l.*, leaving only the principal sum of 500*l.* due upon my said mortgage security, and that I had concurred in the absolute conveyance to the Defendant *S. Cannock* the younger of the hereditaments sold to him as aforesaid. And that in order that the said sum of 880*l.* might be paid to the said *E. Higgins*, and that other occasions of the Defendant *S. Cannock* the elder for money might be supplied, I had consented to lend the Defendant *S. Cannock* the elder the sum of 1332*l.*, making with the sum of 500*l.* then already lent to him, the sum of 1832*l.*, upon the repayment of the said sum of 1832*l.* with interest being secured by the indenture now in statement, the said messuage or dwelling-house called *Lamb and Flag*, and other hereditaments, were in consideration of the said principal sum of 500*l.* then remaining due from the Defendant *S. Cannock* the elder to me, and in consideration of the sum of 880*l.* to the said *E. Higgins*, paid by me at the request and by the direction of the Defendant *S. Cannock* the elder, and in consideration of the sum of 452*l.* to the Defendant *S. Cannock* the elder paid by me, and for a nominal consideration to the said *James Boulter* and the Defendant *S. Cannock* the younger, expressed to be paid by me, conveyed and assigned unto and to the use of me *W. Chichester* in fee, by way of mortgage for securing the repayment of the 1832*l.* and.

interest. And by the indenture now in statement, and in consideration of the said sum of 880*l.* to the said *E. Higgins* paid by me as aforesaid, the said *E. Higgins*, at the request and by the direction of the Defendants *S. Cannock* the elder and *S. Cannock* the younger, assigned and set over to me, my executors administrators, and assigns, the said judgment and all benefit and advantage thereof, and all monies whatsoever secured by the same and all her estate and interest therein, to have, hold, enforce, recover, and receive the same unto me, my executors, administrators, and assigns, absolutely, for the better securing the repayment to me or them of the sum of 880*l.* part of the said sum of 1832*l.*, and the interest of the said sum of 880*l.*, and for that purpose to sue out execution upon the said judgments when I or they should think fit; and the said indenture contained a power of attorney by the said *E. Higgins*, authorizing me in the usual manner to enforce the said judgments. The aforesaid sum of 880*l.* was in fact paid by me to the said *E. Higgins* on the 25th day of July 1846, and the said sum of 452*l.* was also paid by me to or on account of the Defendant *S. Cannock* the elder, at or about the same time."

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 CANNOCK
 v.
 JAUNCEY.

In 1852 *Chichester* became transferee of the mortgage for 4000*l.* to *Jauncey*.

The question was, whether he could be compelled to produce the mortgage deed to *Jauncey*, and the conveyance to *Cannock* the younger, both admitted by *Chichester* to be in his possession.

A motion had been made in this cause in April 1853, for an injunction to restrain the proceedings at law, and to restrain a threatened sale of the property mortgaged to secure the 4000*l.* mortgage, on the Plaintiff's paying

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v.

JAUNCEY.

into Court the sum of 4000*l.* and giving judgment in the action; and on this coming on, an order was made by arrangement, for payment to the Defendant *Chichester* of the sum of 4000*l.*, he undertaking not to proceed with the sale, nor to sue out execution on the judgment, *the order to be without prejudice to any question in the cause.*

Mr. *Bacon* and Mr. *Giffard*, for the motion.

The deed of the 7th July 1846 contains a recital that the judgment debt was paid off. That fact is material to our case; as the question is, whether the judgment debt is or is not subsisting, it is material that we should prove the existence of that deed at the hearing; we are therefore entitled to the production of it.

The only objection that could be made for one moment is, that a mortgagee is not bound to produce his deeds, for which *Browne v. Lockhart* (a), and *Neate v. Latimer* (b), will be cited; but these cases do not apply to this. This is like *Smith v. Duke of Beaufort* (c).

They cited also *Tyler v. Dratyon* (d), *Balch v. Symes* (e), *Kennedy v. Green* (f), *Staunton v. Chadwick* (g), *Neesom v. Clarkson* (h). They said moreover, that the mortgage was in fact paid off by the payment of the 4000*l.*

Mr. *W. M. James* and Mr. *C. Barber*, for the Defendant *Chichester*, referred to *Bentinck v. Willink* (i), on the point of a mortgagee not being bound to show his deeds. As to the payment of the 4000*l.*, that was ex-

(a) 10 Sim. 420.

(b) 2 Y. & Col. 257.

(c) 1 Phil. 209.

(d) 2 Sim. & Stu. 309.

(e) 1 Turn. 87.

(f) 6 Sim. 6.

(g) 3 M. & G. 575.

(h) 2 Hare, 166, *notis.*

(i) 2 Hare, see p. 8.

pressly without prejudice ; and if they were right in claiming 880*l.* more, then the mortgage was not paid off, for they had a right to carry 880*l.* of the 4000*l.* to the account of the judgment debt. The case that the Plaintiffs make is, that they were lending money on a third mortgage of the estate ; that they did so on the faith and representations of the Defendant's solicitors that there were no incumbrances except the two first, while those solicitors knew of the judgment, and ought to have informed the Plaintiffs. Now, how can the production of the deeds required, the conveyance to *Cannock*, and the mortgage deed of the 25th July 1846, be material to the Plaintiffs' case ; the question being, whether the neglect of the solicitors affects *Chichester*. As to the recital in the deed of the 7th July 1846, the fact of that recital is not in issue ; the Defendant admits that it is contained in the deed : the Plaintiffs have therefore by the answer all they can want. They rely on that recital as the only material part of the deed, and they have it admitted.

1853.
CANNOCK
v.
JAUNCEY.

They cited *Gill v. Eyton* (a), *Greenwood v. Rothwell* (b), *Crisp v. Platel* (c).

Mr. *Giffard*, in reply.

The principle of the cases where a mortgagee is protected is, where the mortgagor admits he is the person to pay, and comes to redeem : he must pay before he can see the deeds ; *Greenwood v. Rothwell* is overruled by the case of *Neesom v. Clarkson* (d). That *Chichester* admits the recital is not enough ; we allege a scheme of all the Defendants for defrauding the Plaintiffs. The

(a) 7 Beav. 155.

(b) 7 Beav. 291.

(c) 8 Beav. 62.

(d) 2 Hare, 166.

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CANNOCK

v.

JAUNCEY.

contents of that deed, which clearly has relation to our title, since it contains a recital affecting it, may be very material to prove our case. We have a right to prove it against all the Defendants. The answer of *Chichester* is no evidence of the recital against the other Defendants. We are not bound to read the answer as evidence; but if the answer discovers material deeds, we have a right to their production.

On the 28th May the VICE-CHANCELLOR delivered judgment.

This is a motion for the production by the Defendant *Chichester* of two documents admitted by his answer to be in his possession; and I think that as to one of them, viz. the deed of the 7th July 1846, the Plaintiffs are entitled to the production of it; but they are not entitled to the production of the other deed. Putting aside for the moment the fact of the Defendant *Chichester* having a mortgage, the question in the cause is simply whether a certain judgment debt vested in him is valid and subsisting, or whether it is at an end. The Plaintiffs put their case on two grounds. First, they say the judgment debt is discharged,—actually released by the transactions which took place on the 7th July 1846: and next, that if it is not, the arrangements made between the person in whom the judgment debt was then vested, for the purpose of keeping it alive, were concealed from the Plaintiffs, who were about to advance money on the estate, on the faith of there being no incumbrances except the 4000*l.* and 700*l.* On neither of these questions can I now express any opinion; I have only now to consider the case raised by the Plaintiffs, in order to see how far the production of these deeds is material towards assisting them in making out their case; I must assume that it is possible

that the Plaintiffs may at the hearing be held entitled to the decree that they ask ; and they have a right to the production of any instrument which would show that title.

1853.
CANNOCK
v.
JAUNCEY.

Now *prima facie* *Chichester* would be bound to produce the deed of conveyance of the 7th July 1846 ; it does help to make out the Plaintiff's title, for there is a recital in it which may with other circumstances afford ground for holding the Plaintiffs entitled to the relief that they ask ; but then the Defendant *Chichester* is not merely a creditor, he is also a mortgagee ; for in 1852 he took an assignment from *Jauncey* of the mortgage made to him on the 7th July 1846, by *Cannock* the younger, and in his character of mortgagee he has a right to say, as mortgagee, I am protected. (The Vice-Chancellor referred to the general rule as between mortgagor and mortgagee, that when the mortgagor comes offering to redeem, the mortgagee is not bound to produce his deed till he is paid. His Honor continued)—Now, nothing that I decide in this case is intended to contravene that rule ; but here the Plaintiffs have not only tendered, it seems, but paid to *Chichester* the mortgagee, the 4000*l.* secured on his mortgage ; and if there were no other claim, the mortgage is discharged. But then it is said, that the 4000*l.* was not taken as a discharge of the mortgage. It is said by *Chichester*, "I did not take that in discharge of my mortgage, for I claim besides, 880*l.*, and I have a right to apply the money paid, first in payment of the judgment debt, and next in payment of the mortgage." It appears to me, however, that that is not a ground for refusing production of the deed. If, as I understand the case, the Plaintiffs would have a right to production if there were no mortgage, the payment of the mortgage money prevents the Defendant from saying that he has a right to refuse production.

1853.

CANNOCK

v.

JAUNCEY.

The Defendant was ordered to produce the deed of the 7th July, 1846, but not the mortgage deed of the 25th July, as to which the Court was of opinion that there was nothing to show that it could in any way assist the Plaintiffs in making out their title.

1853 :
27th May.

Agreement.
Construction of
Act of Parlia-
ment,
compulsory
Powers under.

EX PARTE WALKER.

RE THE SHREWSBURY AND HEREFORD
RAILWAY.

THIS was the petition of *Bridget Walker*.

An agreement was entered into between a landowner and a Company having compulsory powers to take land, that if the Company should make their line, they would pay for such, if any, of the land as they should so take, at the rate of 500*l.* per acre; and in consideration of such agreement, the landowner agreed that he would permit the Company to take such land under the authority of their Act, on those terms. The landowner died, and then the Company took some of his land. Held, that the money belonged to his real, and not to his personal representatives.

It stated, that by articles of agreement dated the 21st of December 1846, between the *Shrewsbury and Hereford* Railway Company, under their common seal, of the one part, and *Charles Walker* deceased, of the other part, after reciting that the line of the said *Shrewsbury and Hereford* Railway, as authorized by the *Shrewsbury and Hereford* Railway Act, 1846, to be constructed by the said company, ran through divers lands then of the said *Charles Walker*, and certain parts of the said lands were included within the limits of deviation laid down in the plans referred to in the said Act for the construction of the said intended railway, and the said company might require for the purpose of their undertaking the said lands or some parts thereof. Then, therefore, in consideration of the agreement by the said *Charles Walker*, thereafter expressed, the said company did thereby, for

themselves, their successors and assigns, contract and agree with the said *Charles Walker*, his heirs, executors, administrators, and assigns, that in case *the said Company should construct the said intended railway*, or any part thereof, under the authority of the said Act, and within the said limits of deviation, they would pay to the said *Charles Walker*, his heirs, executors, administrators, and assigns, for such (if any) of his said lands within the said limits of deviation, as they should take for the purposes of the said intended railway, *after the rate of 500*l.* for every acre thereof*; and also that such price to be paid for such lands should be exclusive of compensation to the said *Charles Walker*, his heirs, executors, administrators, or assigns, for damage by severance and other consequential and future and recurring damage, for which respectively full compensation, according to the provisions of the said Act, should be paid to him or them by the said Company. And in consideration of the agreement by the said Company thereinbefore expressed, the said *Charles Walker*, *thereby for himself, his heirs, executors, administrators, and assigns, agreed with the said Company*, their successors and assigns, that the said *Charles Walker*, his heirs, executors, administrators, or assigns, would permit the said Company to take *under the authority of the said Act, and on the terms thereinbefore expressed*, such (if any) of his said lands in the said parish of *Ashford Bowdler*, within the said limits of deviation, as they should, within the period limited by the said Act for the compulsory purchase of lands, require for the purposes of the said undertaking.

1853.

Ex parte
WALKER.

Charles Walker died in 1847, having devised the lands in question unto *John Williams* and *William Urwick* and their heirs, to the uses, upon the trusts, and

1853.

Ex parte
WALKER.

for the intents and purposes, and under and subject to the powers, provisions, and declarations thereafter expressed and declared, of and concerning the same (that is to say), as to, for, and concerning the whole of the same hereditaments and premises, except certain hereditaments in the county of *York*, to the use of the Petitioner and her assigns for her life, without impeachment of or for any manner of waste (other than and except destructive or malicious waste); and from and after the determination of that estate by forfeiture or otherwise in her lifetime, to the said *John Williams* and *William Urwick* and their heirs, during the life of the Petitioner, in trust to preserve contingent remainders. And after the decease of the Petitioner, to the use of his second son *Charles Frederick Walker* and his assigns for his life, without impeachment of, or for any manner of waste, (other than and except destructive or malicious waste), with divers remainders over, with an ultimate remainder to the testator's right heirs. And the said testator appointed the Petitioner and the said *Charles Frederick Walker* his executrix and executor. The said *C. F. Walker* had since alone duly proved the said will.

The several devisees to whose issue the remainders were limited, except *John Curwin Walker*, never had any issue, and *John Curwin Walker*, then in *Van Diemen's Land*, the eldest son of the said testator, was, at the time of the said testator's death, and was then, his heir-at-law.

The Railway Company having occasion for five acres of the said land, forming part of the lands included within the limits of deviation referred to in the firstly above-mentioned Act, and also forming part of the estates and premises late of the testator *Charles Walker*, had recently and since the death of the testator contracted for

the purchase of the said five acres of land for the price or sum of 2500*l.*, and had, in pursuance of such contract, entered into and were in possession of the said five acres of land.

1853.
Ex parte
WALKER.

The Railway Company, pursuant to the said Acts in the title of this petition named, having paid into Court the said sum of 2500*l.*, the purchase-money in respect of the five acres of land, it stood to the credit of "*Ex parte The Shrewsbury and Hereford Railway Company, In the Matter of the Shrewsbury and Hereford Railway Act, 1846: The Account of the Real and Personal Representatives of Charles Walker deceased, in respect of certain Lands situate in the Parish of Ashford Bowdler, in the County of Salop.*"

The Petitioner submitted, that the agreement of the 21st December 1846 did not operate to convert the interest of the said testator in the said piece of land, into *personal estate* during his lifetime.

The petition prayed, that after payment of costs, &c., the residue of the 2500*l.* might be invested, and the interest paid to the Petitioner for her life.

The question was, whether the agreement of the 21st December 1846 operated as a conversion of the real estate of *Charles Walker*, so as to make the money paid in by the railway go to his personal representatives, or whether it belonged to the real representative.

Mr. *Chandless* and Mr. *Eddis*, for the Petitioner, contended that there was no conversion, but the money paid in by the Company went to the devisees of *C. Walker*.

1853.

Ex parte
WALKER.Mr. *Fischer*, for *C. F. Walker*, the executor of *Charles Walker*.Mr. *Kenyon*, for the Company.

The following cases were cited. *Re Taylor's Settlement* (a), *Re Stewart's Estate* (b), *Re Horner's Estate* (c), *Ripley v. Waterworth* (d), *Townley v. Bidwell* (e), *Daniells v. Davison* (f), *Emuss v. Smith* (g), *Lawes v. Bennett* (h).

The VICE-CHANCELLOR:

Assuming that I am bound by the cases cited, I do not think this case falls within them. I think this case turns on the construction of the contract, and is not within the authorities. The real meaning of the contract here is this:—Both parties assume that the Company has power under the Act to take such land of *Walker* as it may think fit, within the limits of deviation; and therefore the Company does not ask *Walker* to contract to sell any land, but only to arrange beforehand the price per acre which the Company shall pay for such land of *Walker* (if any), as they shall take under the powers of the Act. And the contract arranges that price, and does nothing more. The terms of the contract show that to be its meaning. The Company had not made up their mind as to the precise line they would adopt. What is it that, under these circumstances, they contract for? Not that they will purchase any given quantity of land, but that, when they shall have determined on the construction of their line, and want

(a) 9 Hare, 596.

(b) 16 Jur. 1063.

(c) 5 De G. & Sm. 483.

(d) 7 Ves. 425.

(e) 14 Ves. 591.

(f) 16 Ves. 249.

(g) 2 De G. & Sm. 722.

(h) 1 Cox, 167.

the land, they will pay to *Walker*, for such land as they shall take, 500*l.* per acre. There is no agreement for the *purchase of land*; the agreement is merely, that if they take any land under the *compulsory powers* of their Act, the amount to be paid shall not be determined by a jury, but shall be 500*l.* per acre.

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Ex parte
WALKER.

The contract is so made in terms by *Walker*. (The Vice-Chancellor referred to the latter part of the contract, containing the express contract by *Walker*).

It appears to me, that all that is the subject-matter of contract is the *price* of the land.

For these reasons, without adverting to the authorities, it appears to me that the money paid in, is not part of *C. Walker's* personal estate, but was at his death real estate, and continues to be real estate for the benefit of the persons entitled to his real estate; it will therefore go to the persons who are entitled to his real estate.

The fund was directed to be invested accordingly, and the income to be paid to the Petitioner, the devisee, for life.

1853 :
7th June.

MOODIE v. BANNISTER.

Pleading.
Parties.

*Parties out of
the Jurisdiction.*

A bill was filed against *A.* and others, to set aside a deed of assignment by the Plaintiff to some of the Defendants, for fraud. The answer stated a subsequent deed, by which the Plaintiff had assigned all her interest in the property to *B., C., & D.*, in trust for creditors, and submitted that they ought to be parties. The Plaintiff made them parties by amendment, alleging, but not proving, that they were out of the jurisdiction, in *Scotland*, and brought on the cause to a hearing, without bringing them before the Court.

Held, that the Plaintiff having made these persons parties, they ought to be before the Court, if not out of the jurisdiction; and as to their being out of the jurisdiction, if they were so in fact, being only in *Scotland*, the Plaintiff ought to have served them.

THE bill in this case was filed by *Mary Anne Moodie*, who claimed to be entitled, under the will of *John Bannister*, to one-third of his residuary real and personal estate, for the purpose of having the will carried into effect, and of having it declared that a certain deed was obtained by fraud and was void, or that it might stand merely as a security for what the Plaintiff had received on account thereof.

The deed in question, dated the 22nd January 1847, was alleged by the Defendants, *Esther Bannister*, *Sarah Ruth Bannister* and *Susannah Frances Bannister*, to be an absolute assignment to them of the Plaintiff's interest. The Plaintiff alleged that it was intended only as a security for 200*l.* The answer of the *Bannisters* stated, that by an indenture of assignment and assignation, in the Scotch form, bearing date the 14th of May 1847 and duly made and executed by and between the Plaintiff of the one part, and *Thomas Blackwood*, *George Clark* and *Robert Paterson*, trustees nominated and appointed for the purposes thereafter expressed, of the other part, after reciting, amongst other things, an indenture or settlement of marriage, bearing date the 18th of September 1828, under the hands and seals

of *Affleck Moodie* of the first part, the Plaintiff by her then name of *Mary Anne Bannister* of the second part, *George Thomas William Blaney Boyes* of *Hobart Town* in *Van Diemen's Land*, and *Patrick Wood* of *Dennistown* in *Van Diemen's Land* aforesaid, Esq., of the third part; whereby it was, amongst other things, recited that a marriage was intended shortly to be solemnized between the said *Affleck Moodie* and the said Plaintiff, and that the said Plaintiff was entitled to or to some interest in certain lands and hereditaments in *England*, comprising three properties, commonly called or known by the names respectively of *Woolcombes*, *Bridlington*, and *Doves*, situate, lying, and being in the counties of *Kent* and *Sussex*, or one of them; and that, upon the treaty for said intended marriage, it was agreed that, in consideration of such marriage, the said lands and hereditaments in *England*, so soon as the said Plaintiff should be enabled so to do, should together with other hereditaments be respectively settled and assured upon and for the trusts and purposes thereafter expressed. Therefore the said indenture or settlement of marriage witnessed, that in pursuance of the said agreement and in consideration of the said intended marriage, the said *Affleck Moodie* did, for himself, his heirs, executors, and administrators, thereby covenant and agree with and to the said *George Thomas William Blaney Boyes* and his executors, administrators, and assigns, that if the said marriage should be solemnized, the said *Affleck Moodie* and his heirs should and would (amongst other things) convey and assure, or cause to be well and sufficiently conveyed and assured, by such deeds and conveyances as should be for that purpose required, unto the said *George Thomas William Blaney Boyes* and his heirs and assigns, the lands and hereditaments in *Hobart Town* therein particularly mentioned, to the use of, or in trust for him said *Affleck Moodie* and his assigns during his

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natural life, without impeachment of waste ; with remainder to the use of or in trust for the said Plaintiff and her assigns during her natural life, without impeachment of waste ; with remainder to the use of or in trust for such person or persons as said *Affleck Moodie* should in manner therein mentioned direct or appoint. And in default of any such direction or appointment, and as to any part of such premises to which any such direction or appointment should not extend, to the use of or in trust for the right heirs of said *Affleck Moodie* for ever. And also reciting that the said marriage was duly had and solemnized. And that the said *Affleck Moodie* departed this life on or about the 27th of December 1838, leaving the said Plaintiff him surviving. And also reciting that the said Plaintiff was justly indebted and owing to said *T. Blackwood, George Clark, and Robert Paterson and Roy*, and to various other parties in certain (other) sums of money according to the list or schedule thereof, thereunder written, the said several sums making together the sum of 957*l.* 14*s.* 2½*d.* as at the date thereof. And also reciting that said Plaintiff being at present unable to pay said several sums of money, had offered and proposed to assign and transfer to the above-named *T. Blackwood, George Clark, and Robert Paterson*, upon the trusts and for the purposes thereafter mentioned, the whole rents and annual profits already past, due, and still unpaid, and which might thereafter become due to her, said Plaintiff, during the remainder of her natural life, from said premises in *Hobart Town* aforesaid, and also her whole right and interest in the lands and hereditaments in *England* aforesaid, subject and without prejudice to any mortgage, charge, or conveyance to her sisters. And also assign and make over to said parties the whole household furniture and plenishing of every description, and of whatever kind or denomination, belonging to her, said Plaintiff, and then

or formerly within her dwelling-house, No. 29, *Warriston Crescent, Edinburgh*, or the proceeds of said furniture, if already sold. It was by the indenture now in recital witnessed, that in pursuance of said offer or proposal, and in consideration of the premises, said *Mary Anne Moodie* did for herself, her heirs, executors, and administrators, thereby bargain, sell, assign, transfer, and set over unto them, said *Thomas Blackwood, George Clark, and Robert Paterson*, or the survivors or survivor of them, and the heirs and assigns of such survivor, all that the said allotment or piece of ground in *Davey Street, in Hobart Town* aforesaid, with the messuage and buildings thereon, with their appurtenants and all the rents and profits thereof, during the natural life of said Plaintiff; and all other the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity of her, said Plaintiff, under or by virtue of said indenture of settlement, that might have been executed by said Plaintiff and said deceased *Affleck Moodie* or either of them, relative to the same property, as, to, or concerning said rents and profits; and also the whole right, title, interest, and property, both at law and in equity, of her, said Plaintiff, of, in, or to said lands and hereditaments in *England* aforesaid, comprising said three properties commonly called or known by the names respectively of *Woolcombes, Bedlington, and Doves*, situate and being in the counties of *Kent and Sussex*, or one of them, subject and without prejudice to any mortgage, charge, or conveyance granted by said Plaintiff to her sisters as aforesaid, to have and to hold, receive and take the said rents and profits of said allotment or piece of ground and other the hereditaments in *Hobart Town* aforesaid, with their appurtenances, unto said *Thomas Blackwood, George Clark, and Robert Paterson*, and the survivors and survivor of them and the heirs and assigns of such

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survivor, for and during the remainder of the natural life of said Plaintiff, or for and during so long as the trusts thereafter created should endure. And to have and to hold said hereditaments in *England* aforesaid, unto the said *Thomas Blackwood*, *George Clark*, and *Robert Paterson*, and the survivors or survivor of them, and the heirs and assigns of such survivor absolutely, with full power to him or them to make sale and dispose thereof either by public sale or private contract, and to give all proper and necessary receipts to the purchaser or purchasers thereof, but subject and without prejudice to any mortgage, charge, or conveyance, granted by said Plaintiff to her sisters as aforesaid. But nevertheless, as to the whole of said property, upon the trusts and for the purposes thereafter mentioned and declared ; which trusts were for the benefit of her creditors.

On this cause coming on to be heard,

Mr. *Daniell* and Mr. *Tripp*, for the Plaintiff, were about to open the case, when

Mr. *Bacon* and Mr. *Speed*, for the Defendants *Esther Bannister* and *E. Ruth Bannister*, objected that *Boyes*, the trustee of the marriage settlement of Mrs. *Moodie*, and *Blackwood*, *Clark*, and *Paterson*, were not before the Court. The answer had insisted that the trustees of the creditors' deed ought to be parties. The bill was accordingly amended, and made *Boyes* and them parties ; alleging, but not proving, that *Boyes* was out of the jurisdiction in *Van Diemen's Land*, and that the other three were out of the jurisdiction, viz., in *Scotland*, and this was admitted. But the cause was brought on without their being before the Court.

They submitted, that *Boyes*, as the trustee of Mrs.

Moodie's settlement, and the trustees of the creditors' deed, had an interest. As to the latter, if the Defendants obtained a decree, that would not bind the trustees, who might file a fresh bill against them the next day. On the other hand, if the Plaintiff was right in her claim, anything that might have to be paid by the Defendants would be payable to the trustees of the creditors' deed, and not to the Plaintiff personally, and the cause could not proceed in their absence.

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Mr. *Daniell* and Mr. *Tripp* were heard *contra*.

Mr. *Bristowe*, for other Defendants.

The VICE-CHANCELLOR :

The question is, whether *Boyes* and three other persons, *Blackwood*, *Clark*, and *Paterson*, parties to this suit, should now be present.

As to *Boyes*, I do not think it necessary that he should ; he is a mere trustee, having no interest.

As to the other three, the case is different. The Plaintiff's bill was originally filed against other Defendants (not making the trustees of the creditors' deed parties), to set aside a deed of the 27th January 1847. The Defendants say, that by a deed subsequent to that, viz., the deed of May 1847, the Plaintiff assigned over to *Blackwood*, *Clark* and *Paterson*, all her interest in the property, or at least some interest in it, and that a decree against the Plaintiff would not bind those three persons ; or supposing the Plaintiff to succeed, and to be entitled to receive money, then that the money ought to be paid into the hands of *Blackwood*, *Clark* and *Paterson*.

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That statement is made by the answer, which sets out, so far as is necessary to show the interest of these three persons, what the deed was, and it submits that they are necessary parties.

The Plaintiff amends her bill and adds them as parties. Surely this is a recognition of the justice of the Defendants' requisition that they should be parties. If a Defendant insists on certain persons being parties, the Plaintiff must judge for herself whether they should be so made; the Plaintiff here has exercised her judgment, and made them parties; therefore I think, being made parties, they ought to be here.

Then it is said that they are all out of the jurisdiction. Now if that be so, it ought to be proved, and it is not. But assuming it to be proved, they are only in *Scotland*; and ought not the Plaintiff to serve them, under the course of procedure provided for that purpose by the rules of the Court, so that they may appear if they choose? If they were served, then one decree, whether adverse or favourable to the Plaintiff, would relieve the Defendants from further attacks.

I think the objection valid, and that I ought to yield to it.

WOODCOCK v. OXFORD AND WORCESTER
RAILWAY COMPANY.

THE bill in this case was filed by *Woodcock & Part*, who had become sureties in a bond for 5000*l.* to the Defendants for the due performance of certain works relating to the making of a tunnel on the Defendants' line, by *Williams, Ackroyd, & Price*, the original contractors for such work.

Disputes having arisen, the Company brought an action on the bond against the Plaintiffs in equity, who thereupon filed this bill, and had obtained the common injunction.

The matter now came on, the answers being put in, on the Plaintiffs showing cause against dissolving the injunction.

The case made generally by the Plaintiffs was this: They said that the Defendants, the Company, had so dealt with the principals, *Williams, Ackroyd, & Price*,

1853:
30th April and
8th June.

*Principal and
Surety.
Surety,
Release of.*

A., B., & C. contracted with a Company to execute certain works on given terms. *D. & E.* gave a bond as their sureties for the performance of the contract. *A.* and *B.* retired from the partnership, and *F.* was substituted. Afterwards disputes arose between the Company and *C. & F.* as to the conduct of the works, and various transactions

took place by which the terms of the contract were varied, and during which the Company paid to *C. & F.* certain monies which it had been agreed originally should be paid to *A., B., & C.* *D. & E.*, the sureties, were no parties to these transactions, and gave no express consent; but they had been the solicitors of *A., B., & C.* in the original contract; knew of all the subsequent transactions, and acted as the solicitors of *C. & F.*, and as such solicitors prepared many of the documents required for such transactions. The Company having brought an action on the bond against the sureties, for breach of the contract, they filed this bill to restrain the action. Held, that the sureties were not discharged, and that the action could not be stopped.

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that they had discharged the Plaintiffs from their liability as sureties. The facts on which the Plaintiffs rested their contention were shortly as follows * :—

The contract for the performance of work for which the Plaintiffs were sureties, was entered into in November 1846 by three persons, *Williams, Ackroyd, & Price* on the one part, and the Railway Company on the other part, and by it *Williams, Ackroyd, & Price* contracted to do certain works in the construction of a tunnel, called the *Mickleham Tunnel*.

An agreed sum was to be paid to the contractors, of about 109,000*l.*; and, according to the contract, they were, as the work proceeded, to be paid from time to time such further sums as Mr. *Brunel*, the engineer of the Company, should certify to be payable to them.

The contractors were to purchase from the Company certain plant and machinery, for which they were to pay 10,000*l.*; so that the Company were to pay to the contractors the sums which the engineer should certify, and the contractors were to pay to the Company 10,000*l.*

Contemporaneously with this contract, the Plaintiffs, together with the contractors, executed a joint and several bond, dated the 4th November 1846, by which they bound themselves to the Company in the penalty of 5000*l.* for the due performance of the contract. This was, therefore, a simple suretyship for the performance of the contract. The works proceeded slowly,

* This statement of the facts forms part of the judgment delivered by the Court. The Reporter has transferred it to this portion of the report, to avoid repetition.

and were, as the Company alleged, neglected. Thus things went on till December 1848, when *Ackroyd* and *Price* desired to retire from the partnership, and an agreement was made on the 21st December 1848, between *Williams, Ackroyd, & Price* (to which the Company were no parties), by which *Ackroyd* and *Price* retired, and all the benefit of the contract was given up to *Williams*. This was duly advertised, and as between them there was an end of the partnership. About the same time *Williams* entered into a partnership agreement with *Marchant*, by which it was agreed that they should carry on the contract. The Company was no party to this agreement.

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In May 1849, the Company falling into embarrassment, and not having money sufficient to supply the continued execution of the works, applied to *Williams & Marchant*, desiring to know on what terms they would agree to suspend the completion of the works. Here they treated *Williams & Marchant* as the persons carrying on the contract. At that time Mr. *Brunel* had certified that 4300*l.* should be paid to the contractors in respect of work already done.

In answer to the application of the Company, *Williams & Marchant* wrote to the directors on the 30th May 1849, offering to suspend the works on the terms that they were to receive the 4300*l.*, and that the Company should make certain other payments, to be ascertained, in respect of other matters not comprised in the engineer's certificate.

On the 12th June Mr. *Brunel* wrote on behalf of the Company to *Williams & Co.*, accepting the terms of their letter, and the works were suspended accordingly,

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COMPANY.

Williams & Marchant doing merely what was absolutely necessary to prevent injury by the suspension of the works.

Differences then arose between the Company and *Williams & Marchant* as to what the Company was to pay in respect of the other matters not comprised in the 4300*l.*, and by an indenture of the 17th November 1849, between the Company of the one part and *Williams & Marchant* of the other part, an arrangement was entered into to the effect that the matters in difference as to the sums to be paid to *Williams & Marchant* should be referred to the arbitration of Mr. *Brunel*, who was to take all the circumstances into consideration, and determine what was to be paid by the Company in respect of timber left on the works; what they were to pay further in respect of the suspension of the works, &c. All these matters were referred to Mr. *Brunel*, and he was to take into account the 10,000*l.* which *Williams & Marchant* had to pay to the Company in respect of the plant and machinery, which *Williams, Ackroyd & Price* had agreed to purchase from the Company. In pursuance of this submission to arbitration, Mr. *Brunel* made three awards.

The first was on the 19th November 1849, by which he certified that 7500*l.* were to be paid by the Company for items specified in the schedule to the deed of submission, and in respect of timber and plant left in the shafts, and which the Company were to pay for after setting off the 10,000*l.* which the contractors had agreed to pay.

In pursuance of this first award, debentures of the Company were given to *Williams & Marchant*, to secure 7800*l.*

The second award was made on the 21st November 1850, and it awarded a further sum of 4025*l.* 7*s.*, to be paid or secured to *Williams & Marchant*, in respect of other portions of the matters in dispute.

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Before the last award was made, it became necessary to extend the time, and two different deeds were executed, one dated the 19th May, and the other the 29th June, extending the time for Mr. *Brunel* to make his award.

On the 13th July, Mr. *Brunel* made his third award, and determined that 6830*l.* was the amount the Company was to pay for the suspension of the works; and of this sum he ordered 1330*l.* to be paid in court in twenty-one days, and the remainder of it to be secured by debentures of the Company.

That was done, and the debentures were given. So matters remained, the contractors only doing what was necessary to preserve the works till March 1851. But during that time *Williams & Marchant* had been urging the Company to determine about the remainder of the works, and urging that they ought to be paid farther sums, by reason of the continued suspension of the works, and the expenses they were put to; and, in order to settle these differences, there was on the 6th May 1851 another submission to the arbitration of Mr. *Brunel*; the works were to be continued, and Mr. *Brunel* was to determine what was to be considered as being paid by the 109,000*l.*, what other sum or sums were to be paid by the Company, and within what time the works were to be completed.

The works being resumed, the Company considered

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that *Williams & Marchant* were not proceeding with sufficient vigour, and on the 9th June 1851, they served a notice on *Williams & Marchant* to proceed more effectually.

On the 21st June 1851, *Williams & Marchant* served a notice on Mr. *Brunel*, calling on him to proceed with his arbitration under the submission of the 6th March 1851. The Company then considered it right to take possession of the works, on the ground that they were not proceeding, and they served notice, on the 21st June 1851, on the contractors, that they should take possession, and meant to put the matter into the hands of other contractors. This led to hostile proceedings, which ended in an agreement of the 21st July, between Mr. *Brunel* on the one part, and *Williams & Marchant* on the other part, to give up possession to the Company, without prejudice to any question.

On the 21st August a deed of submission was prepared referring the matter to the arbitration of Mr. *Cubitt*, or some other engineer.

In the mean time, the contractors having become bankrupt, in June 1851 an action had been brought by the Company against *Woodcock & Part*, the sureties for 5000*l.*, on the ground of breaches of the contract, for which they sought to recover from the sureties, and then this bill was filed by *Woodcock & Part* against the Company.

Mr. *Follett* and Mr. *T. H. Terrell*, for the Plaintiffs, showed cause.

Our case is, that if there have been breaches of contract by the original contractors, they have been waived

by the Company, and of course no action will lie against the sureties.

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But assuming that not to be so, the Company, by paying money, as they have done, on account of the contracts, to the contractors, have parted with the fund which, if there have been breaches, they ought to have held as a guarantee for the Plaintiffs. If the contractors had committed breaches, for which their sureties would be liable, the money due from the Company to the contractors ought to have been by them placed at the disposal of the sureties : by paying it over to the contractors, they have altered our position.

It is said that the sureties knew of the transactions ; but they knew them only in their character of solicitors ; besides, the mere knowledge and even consent of the sureties to these changes would not renew their suretyship. They did not consent to their change of position as sureties. What they consented to, was to be discharged, as the proper consequence and effect of the transaction.

We have no defence at law : the action is on the bond ; and the only defence would be payment, or release under seal, neither of which can we show ; the equitable circumstances could not be pleaded at law, *Davy v. Pendergrass* (a). (They cited also *Calvert v. London Dock Company* (b), and *Law v. East India Company* (c)).

Mr. Malins and Mr. Rogers, for the Defendants.

The several deeds referred to in these pleadings were

(a) 5 Barn. & Ald. 187.

(b) 2 Keen, 638.

(c) 4 Ves. 824.

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executed with the privity and assent of the Plaintiffs. The deed of the 6th March 1851 was prepared with their assistance; they acquiesced, in fact, in the whole transaction, as attornies of the contractors; and they are therefore not released. We do not dispute the general rule as to releasing sureties by changing their position, but that must be when they do not assent; but here they have positively acted, and thereby assented, and then the rule does not apply.

Mr. *Follett*, in reply.

The question is not, whether this Court may or may not at the hearing conclude against the sureties; but whether that question ought not to be tried in this Court at the hearing, and whether in the mean time the action ought not to be stopped; whether, in fact, this is a proper case to be tried at law.

The action is on the bond: a simple bond of indemnity for *Williams, Ackroyd, & Price*. The only question at law would be, have those *three* performed the contract? and unquestionably they have not. We can have therefore no defence at law; and the equities on which we rely cannot be tried or looked at in the action. The Court will not let such an action, in which the real merits cannot be tried, go on.

On the 8th of June the VICE-CHANCELLOR delivered judgment. After stating the facts his Honor continued:

Now it is contended by the Plaintiffs, that all these circumstances put together—first, the transfer of the contract to *Williams & Marchant*; then, the Company dealing with *Williams & Marchant* as they did, entering into arrangements with them, altering the contract, the time at which it was to be carried into effect, the terms

and mode of payment to the contractors;—all these circumstances, they say, bring this case within the principle, that if a creditor so deals with his principal debtor as to alter the position of the surety, he discharges the surety.

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But, as the Defendants' counsel suggest, that principle applies only when the transaction is without the concurrence of the surety; and the Plaintiffs have felt the importance of that ingredient in the matter, that it must be without the concurrence of the surety; for the bill contains again and again passages charging that the sureties knew nothing of the transaction,—were neither parties nor privies to any of the transactions subsequent to the giving of the bond. The whole of the equity of the bill is founded upon that.

Now, from the answer, and not merely by the statements of the answer, but by correspondence referred to, this appears:—*Woodcock & Part* being in partnership as solicitors, with *Scott*, the firm being *Woodcock, Part & Scott*, were solicitors for *Williams, Ackroyd & Price*. They prepared the contract and the bond; they continued to be the solicitors of the contractors when *Ackroyd* and *Price* withdrew, and *Marchant* was substituted; they continued to act as the solicitors of *Williams & Marchant*; they were the solicitors who assisted in the preparation, if not of every one, at least of most of the subsequent instruments; and, to show beyond doubt that the allegations of the bill, as to the transactions having taken place without the knowledge or concurrence of the sureties, have no foundation, correspondence is set out between the firm of *Woodcock, Part & Scott*, as solicitors for *Williams & Marchant*, with the Company, on the subject of the arrangements

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by which all the matters in difference under the first submission were referred to the arbitration of Mr. *Brunel*, and by which the Company adopted *Williams & Marchant* as contractors, and dealt with them as such, being the very arrangements which the Plaintiffs say discharged them.

Under these circumstances, without going any further, I think the equity claimed by the bill rests on allegations wholly unfounded in fact. It does not rest merely on the statements of the answer, but it appears by the correspondence, not only that the transactions on which they rely for their discharge were known to the Plaintiffs, but that they assisted, as the solicitors of the principal debtor, in the preparation of instruments for carrying into effect the arrangements of which they complain. I must therefore dissolve the injunction.

The costs were reserved to the hearing, if the suit should be prosecuted; if the suit should not come to a hearing, the Plaintiffs to pay the costs of the motion.

Between JAMES WHITBREAD and MARY his
Wife, Plaintiffs;

AND

MAPSON THOMAS SMITH, MACDONALD
STEELE, ELIZABETH WILLIAMS, and WIL-
LIAM HENRY WILLIAMS, Defendants.

1853:
20th April
and
11th June.

*Deeds, reversed
Construction of. S. D. Hughes*

Real estate was
settled on the
husband for life;
remainder to his
wife for life; re-
mainder to the
heirs of the body
of the wife; re-
mainder to the
right heirs of
the husband;
the husband and
wife barred the
wife's estate
tail; and by that
and other deeds
it was settled
to such uses as
the husband
should appoint.
He appointed,
by a deed of July
1817, to such
uses as "he and
his wife should

727.

THE Plaintiffs in this case claimed as purchasers,
under a deed dated the 13th of April 1850, from *W. Rees*,
the son of *W. Rees*, who died in September 1849. The
Defendants, *M. T. Smith* and *M. Donald Steele*, were the
devisees in trust of the will of *Thomas Williams*; *Eliza-
beth Williams* was his executrix; and *W. H. Williams*,
his son, and beneficial devisee.

The following is a statement of the substance of the
material deeds and facts on which the question in the
cause turned.

By an indenture of the 28th May 1794, and a fine then
levied, certain real estate was limited to *William Rees*

jointly appoint, and in default to himself for life; remainder to his wife
for life; remainder to his son in fee." The husband and wife made
several mortgages, all except one limiting the equity of redemption
upon or consistently with the uses of the deed of 1817.

In 1832 they made, under the power in the deed of 1817, another
mortgage which limited the equity of redemption to the husband
and wife, "their heirs or assigns, or to such other persons, &c., as
they should direct;" and by a deed of even date certain terms were
assigned to attend the inheritance according to the uses of the other
deed of even date. Held, that the deed of 1832 was intended to
vary the limitation of the equity of redemption, and defeated the limi-
tation of the fee of the deed of 1817.

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the elder, and *Mary* his wife, and their heirs, until the then intended marriage of their son with *Anne Harris*; with remainder to the said *William Rees* the elder and *Mary* his wife, for their lives and the life of the survivor; with remainder to *Warren Jane*, for a term of 100 years, upon certain trusts which never arose; with remainder to *William Rees* the younger for life; with remainder to *Anne Harris* for life; with remainder to the heirs of the body of *Anne Harris* by *William Rees* the younger; with remainder to the right heirs of *William Rees* the younger.

On the 28th April 1808, *William Rees* the elder died, and on the 15th May 1813, *Mary Rees* died.

By indenture of 2nd June 1815, and a recovery then suffered, the estate tail of *Anne Harris* (then *Rees*), was barred, and the estate was limited to *Baker* and *Price* for a term of 1000 years, upon trust to raise 500*l.*; with remainder to *William Rees* for life; with remainder to *Anne* his wife for life; with remainder to *Baker* and *Price* and their heirs, during their lives, &c., as trustees, to preserve, &c.; with remainder to *Gardner* and *Baker* for a term of 1000 years, to raise 600*l.* for the children of *William Rees* by *Anne*; with remainder to the right heirs of the survivor of *William* and *Anne Rees*; and this indenture contained a reservation of powers of revocation and new appointment in *Rees* and his wife.

On the 27th March 1815, *Baker* and *Price*, as trustees of the first term of 1000 years, mortgaged to one *Howell* to secure 400*l.*

By indenture of 30th June 1817, *Rees* and his wife revoked the uses in the deed of the 2nd of January 1815, save as to the first term of 1000 years, and the

estate was thereby limited, subject to the said term, to such uses, &c., as *William Rees* alone should by deed or will appoint.

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On the next day, 1st July 1817, *William Rees* by deed poll appointed the estate to such uses, &c., as *he and his wife* should jointly appoint, and in default of appointment to himself for life, with remainder to his wife for life, with remainder to his son *William Rees*, in fee, charged with 600*l.*

On the 2nd July 1817, *William Rees* and his wife appointed the estate to *Matthews* by way of mortgage, for a term of 700 years, to secure 250*l.*, and provision was thereby made for “cesser of the term,” on repayment of the money.

On the 27th August 1817, *Howell's* mortgage was assigned to one *Richards*, and *William Rees* and his wife appointed the estate to him by way of further mortgage for a term of 800 years, to secure in all 600*l.*; this deed also provided for the “cesser of the term” on repayment being made.

On the 10th July 1818, *Matthews* assigned his mortgage to *Waters*.

On the 29th July 1818, *Richards* and *Waters* assigned their mortgages to *Jenkins*, and *William Rees* and his wife appointed the estate to him, to secure altogether 1000*l.*; the proviso for reconveyance was, “unto such persons, for such estates and such manner as the said *William Rees* and *Anne* his wife should appoint, and in default of appointment to attend the inheritance.”

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On the 22nd September 1820, *Jenkins'* mortgage was assigned to *Morgan*, and *William Rees* and his wife appointed the estate to *Morgan* in fee, to secure in addition 140*l.*; the proviso for reconveyance in this deed was "to *William Rees* and *Anne* his wife, their heirs or assigns, or to the use of such person or persons for such estate or estates, &c. as they should jointly appoint, &c. and in default thereof, to such uses as were limited by the deed poll of 1st July 1817."

On the 4th March 1824, *Rees* and his wife appointed the estate by way of mortgage to *Mostyn*, with a proviso for re-conveyance unto and to the use of *William Rees* and *Anne* his wife, their heirs, appointees, and assigns, or as he or they should direct.

On the 23rd November 1826, *Morgan* and *Mostyn's* mortgages were assigned to *Anne Philips*, and *Rees* and his wife further charged the estate, making 1350*l.* the total then due. This deed provided for reconveyance unto "*William Rees* and *Anne* his wife, to, for, and upon such uses and subject to such power of appointment and other powers as are declared of and concerning the same, by the deed poll of 1st July 1817."

On the 23rd November 1826, the estate was further mortgaged by *Rees* and his wife to *Protheroe* and *Philips*, to secure 150*l.* 17*s.* 6*d.* This deed provided for reconveyance unto said *William Rees* and *Anne* his wife, upon the uses and trusts declared by said deed poll of the 1st July 1817.

On the 7th May 1832, the premises were appointed in fee by *Rees* and his wife to *Walker Gray*, to secure

(including *Anne Phillips*’, and *Protheroe* and *Phillips*’, mortgages, thereby assigned) 1450*l.*, and it was thereby provided, that on repayment of the mortgage money the estate should be reconveyed “unto and to the use of the said *William Rees* and *Anne* his wife, their heirs or assigns, or unto such other person or persons, &c. as they should direct.” And a power of sale was thereby given to *Gray*, the surplus purchase-money being made payable to *William Rees* and *Anne* his wife, their heirs, executors, administrators, and assigns, or as they should direct.

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On the following day a further charge of 150*l.* in favour of *Gray* was created by *Rees* and his wife.

Anne Rees died on the 6th September 1841.

On the 19th July, 1842, *William Rees* further mortgaged the estate in fee to *Martin*, to secure, including *Gray*’s mortgage, thereby assigned, 1800*l.* This deed provided for re-conveyance “unto and to the use of said *William Rees* his heirs or assigns, or as he or they should direct.”

Martin on the 22nd of February 1843, assigned to *Colvin*, and on the 5th November, 1845, *Rees* and *Colvin*, in pursuance of a contract for sale, conveyed for 1900*l.*, out of which *Colvin*’s mortgage was paid off, to Mr. *Williams*, the testator of the defendants *Smith* and *Steele*.

William Rees died in September 1849, leaving his son *William Rees* the younger surviving, who conceiving that he was entitled under the deed of 1817, conveyed to a trustee for the Plaintiffs.

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The remaining material facts are stated in the judgment.

The bill was to redeem as against the representatives of *Williams*, treating the conveyance of 1848 as merely a security for the mortgage money charged on the estate.

Mr. *Glasse* and Mr. *Whitbread*, for the Plaintiffs.

The deed of the 1st July 1817, vested the estates in question in *W. Rees* the elder, in default of appointment, for his life only; remainder to his wife for life; remainder to his son, *W. Rees*, the vendor, in fee. The power of appointment reserved to the husband and wife by that deed was exercised to make several mortgages; none of these deeds showed any intention to alter the limitation of the equity of redemption.

Nor did (as will be urged on the other side) the deed of 7th May 1832. That was no more than a transfer of a mortgage; the proviso for re-conveyance to *W. Rees* and his wife, or as they should appoint, was only in reference to the mortgage estate, and did not affect the equity of redemption. *W. Rees* therefore, at the time of agreement for sale to *Williams*, and the conveyance to him, both of which were after the death of Mrs. *Rees*, was only tenant for life; and on his death his son became entitled.

They referred, in this branch of the case, to *Jackson v. Innes* (a), *Ruscombe v. Hare* (b), *Hipkin v. Wilson* (c), and *Plowden v. Hyde* (d). They cited also *Wood v. Wood* (e).

(a) 16 Ves. 356,

(d) 2 Sim. N. S. 171.

(b) 6 Dow. 1.

(e) 7 Beav. 183.

(c) 3 De G. & Sm. 738.

A second point was made in argument, viz. that if the deed of 1832 did alter the limitation of the equity of redemption, the conveyance to *Williams* was a fraudulent conveyance at an undervalue, and then *W. Rees* the younger would be entitled as heir; this was, however, given up.

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Mr. *Campbell* and Mr. *Hawkins*, for the Defendants.

The deed of May 1832, shows an intent to revoke the limitation of the equity of redemption of the deed of July 1817, and to create a new one.

That there is no express recital of such an intention, is not material, *Innes v. Jackson* (a).

As to *Ruscumbe v. Hare* (b), there the question related to a supposed new limitation of the wife's estate; that class of cases does not apply. Here the estate was not the wife's; it came on the husband's side, and the wife had no more than a life estate.

Wood v. Wood (c) was also a case of the wife's estate, and there it was clear she had no intention beyond making a mortgage. *Hipkin v. Wilson* (d) turned on the evidence of intention, showing an intention the very reverse of an intention to change the limitation of the estate.

Plowden v. Hyde has no application to this case: there the question was as to the revocation of a will.

(a) 16 Ves. 356.

(b) 6 Dow. 1.

(c) 7 Beav. 183.

(d) 3 De G. & Sm. 738.

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They cited also *Falconberge v. Fitzgerald* (a), *Anson v. Lee* (b), *Barnett v. Wilson* (c), *Reeve v. Hicks* (d), *Rowel v. Walley* (e).

Mr. Glasse, in reply.

On the 11th June the VICE-CHANCELLOR delivered the following judgment:—

The only question is, whether the mode of wording the proviso for redemption in the deed of May 1832, has the effect of altering existing limitations created by a previous settlement.

The circumstances are these. By the original settlement, made in 1794, on the occasion of the marriage of *W. Rees* and *Anne Harris*, and by subsequent deeds, the last being made on the 1st July, 1817, a certain estate called the New Inn estate, was settled, subject to a mortgage term of 1000 years in one *Howell*, thus: to the use of such person or persons, and for such estate and estates, and chargeable in such manner and form, and with, under, and subject to such powers of revocation and new appointment, and other powers as *William Rees* and *Anne* his wife should or might, by any deed or deeds, instrument or instruments in writing to be by them sealed, &c., direct, limit, or appoint; and for want of and in default of such direction, &c., and subject thereto, to the use of *William Rees* for life; remainder to the use of his wife *Anne* for life; remainder to the use of their son *William Rees*, his heirs and assigns, charged with a sum of 600*l*. Several mortgages were executed by *Rees* and his wife, under the power contained in this deed; the first set were only mortgages for terms for years;

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|---------------------------|----------------------------|
| (a) Fitzg. 207, and 6 Br. | (c) 2 Y. & Col. C. C. 407. |
| P. C. 295, 305. | (d) 2 Sim. & Stu 403. |
| (b) 4 Sim. 364. | (e) 1 Rept. in Ch. 116. |

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afterwards, several mortgages were executed in fee; and on the latter, the question in this case turns. The first mortgage for a term is dated the 2nd July 1817, a mortgage to *Matthews*, containing a proviso for cesser on payment; that was assigned in July 1818, to *Waters*. In August 1817, there was an assignment of *Howell's* mortgage to *Richards*, with a proviso for cesser; out of the 600*l.*, the subject of that mortgage, *Howell's* 400*l.* was paid, and the term for a thousand years became thereby satisfied. The next is a deed of July 1818, mortgaging to *Jenkins*; he paid off the mortgage to *Waters*, and advanced a further sum to *Rees* and his wife, and to secure that, *Rees* and his wife appointed to *Jenkins*; and there was this proviso, that on payment by the said *William Rees* and his wife, or either of them, *Jenkins* should reconvey to such uses as *William Rees* and *Anne* his wife should jointly appoint, and in default, in trust for *William Rees* and *Anne* his wife, or the person who should be entitled to the equity of redemption under or by virtue of the limitations contained in the deed poll of the 1st July 1817, and to attend the inheritance.

These were the mortgages for terms.

I now come to the mortgages in fee, and these are the most material instruments.

The first was by indentures of lease and release, dated the 21st and 22nd September, 1820, to *Morgan*. (His Honor stated the effect of this deed, see *ante*, p. 534).

Out of the 1140*l.*, *Jenkins's* mortgage was paid, and he joined in assigning the two terms to *Mac Donnell*; and the old satisfied term of 1000 years was also assigned by this deed. The proviso for redemption in this deed

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was thus: upon payment, *Morgan* was to reconvey to such persons &c., as *Rees* and his wife should appoint jointly, and in default of appointment, "to such uses as were limited by the said deed poll of the 1st July 1817;" thus clearly preserving the limitations of the deed of the 1st July 1817, as the limitations according to which the equity of redemption was to go.

The next is a deed of the 4th of March 1824, a mortgage to *Mostyn*; that deed does not recite the deed of the 1st July 1817, but does recite the deed of 1820, and in doing so states that it was executed by virtue of the power of appointment contained in the deed of the 1st July 1817. The proviso for redemption is, that *Mostyn* shall reconvey to the use of *Rees* and his wife, or as he or they should appoint; this deed contained a power of sale.

The next deed is material; that is a mortgage of the 23rd November 1826, to *Anne Phillips*, to secure the sum of 1350*l*; out of that, 1260*l*. 19*s*. 3*d*. went to pay off *Morgan*; the remainder was paid to *Mostyn*; that was not sufficient to pay all that was due, and the balance was paid by *Rees* and his wife; there was therefore no advance of money by *Anne Phillips* actually, to *Rees* and his wife: it was a mere transfer of a mortgage to *Anne Phillips*. This deed preserved also the limitations of the deed poll of the 1st July, 1817; the proviso for redemption was for re-conveyance to *Rees* and his wife, to such uses as they should appoint, and subject to such powers of appointment and other powers, as were declared by the deed poll of the 1st July, 1817; and by it *MacDonnell* assigned the three terms to *Protheroe*.

It contained a power of sale, and the money produced

by any sale was, after paying the costs and incumbrances, to be paid "to the person or persons who should for the time being be entitled to the equity of redemption, or beneficial estate of and in the hereditaments and premises which should be sold," &c.

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Now, it is not sufficient to say that these deeds do not manifest an intention to alter the limitations of the estate; they contain a positive expression of intention the other way, that the uses of the deed of the 1st July, 1817, should be preserved, and that the equity of redemption should go according to those limitations.

On the same day, but after the execution of the last deed, another mortgage was made by *Rees* and his wife to *Protheroe* and *Phillips*, with a proviso for redemption in the same terms.

Then comes the deed on which the question turns; five or six years later, viz., in May, 1832, *Anne Phillips* wanted her money, and *Protheroe* and *Phillips* wanted theirs. *Protheroe* and *Phillips* having been paid by *Rees* and his wife, there remained the mortgage for 1350*l.* to *Anne Phillips*, and *Rees* and his wife applied to *Gray*, who advanced 1450*l.* to pay the 1350*l.* to *Anne Phillips*, and the remainder was advanced to *Rees* and his wife; and by deeds of the 6th and 7th May 1832, reciting the deed poll of the 1st July 1817, *Rees* and his wife, by virtue of the power of appointment reserved by the deed of the 1st July 1817, appointed to *Gray* in fee, with this proviso for redemption, that upon payment of the mortgage debt, *Gray* should reconvey to "*William Rees* and *Anne* his wife, their heirs or assigns, or unto such person or persons, and for such intents and pur-

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poses, &c., as they should direct ;" then there was a power of sale, by which it was declared that the residue of the money produced should be paid to "*William Rees and Anne* his wife, their heirs, executors, administrators, or assigns, or as they should direct."

And the last clause of this deed contains a declaration, after the usual covenants for title, that until default, it should be lawful for "*William Rees and Anne* his wife, their heirs or assigns, peaceably and quietly to enjoy," &c. This is not conclusive, but it is not unimportant. There is no allusion whatever to the limitations of the deed of 1st July 1817, but on the contrary, it is assumed that the limitation of the equity of redemption is to *Rees* and his wife in fee.

There was a deed of even date, an assignment of the terms, which is very material. The terms had been assigned to *Protheroe* ; by this deed they were assigned to one *Cook*, in trust for *Gray*, and the trusts declared of the terms are material ; they were to secure the mortgage debt, and subject thereto "to attend the inheritance of the same premises, according to the uses and estates limited or created therein by the said thereinbefore in part recited indenture of even date therewith (viz. the transfer of the mortgage), and so as to be subservient to such uses and estates, and to protect the same from all mesne incumbrances." So that by this deed, by which the terms were assigned to secure the mortgage money, the declaration of the trust to attend was, not according to the uses of the deed of 1st July 1817, but according to the uses created by the mortgage deed of even date, that is, to the use of *Rees* and his wife, and their heirs and assigns.

These are the material mortgage deeds. On the 6th of September 1841, *Anne Rees* died, leaving her husband living.

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In July 1842, *Rees*, treating himself as entitled to the equity of redemption in fee, considering the estate as limited to himself and his wife in fee as joint tenants, borrowed 1800*l.* from *Martin*, and he and *Gray* conveyed to *Martin*, with the usual proviso for redemption.

That mortgage was transferred to *Colvin* in February 1843; and in July 1844, *Rees*, still treating himself as owner of the equity of redemption, subject to the mortgage to *Colvin*, agreed to sell to *Williams* for 2100*l.* That agreement was carried out by a conveyance in November 1845; but it seems that, some doubt having arisen as to the title, it was agreed that the price should be only 1900*l.* instead of 2100*l.*, and that was the consideration of the deed of 1845. *Colvin* was paid off, and he and *Rees* conveyed to *Williams*, who is represented by the principal Defendants.

Afterwards, *Rees* having died, *W. Rees*, his son, to whom the remainder in fee was limited by the deed of 1st July 1817, was advised that he could make a title; that the limitation to him was not defeated. He assigned his claim to the Plaintiffs, the *Whitbreads*, and they file this bill to redeem the mortgage.

(The bill also attempted a case of fraud as to the sale, the Plaintiff claiming in that view, as under *W. Rees*, the son, as heir of his father, to set aside the sale. This case was abandoned at the hearing; and properly, as there is no foundation for it whatever.)

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The only question then is, whether the deed of 1832 altered the devolution of the equity of redemption, or whether the limitations of the deed of the 1st July 1817 continued in operation.

Now, beyond all question the rule is clear, that if husband and wife concur in mortgaging the wife's estate, or an estate in which she has any interest, whether it be a right of dower or an interest in remainder, or otherwise, *primâ facie*, in the absence of evidence of intention to the contrary, the wife is considered as having joined merely to secure the mortgage ; and the terms in which the equity of redemption is limited will not affect her right.

Ruscombe v. Hare was the case of a limitation of the wife's estate ; and the House of Lords determined, that she having joined, her right in the equity of redemption remained unaffected.

In *Innes v. Jackson* Lord *Eldon* puts it on this : that there is a resulting trust ; that although the limitation is to the husband in fee, yet if it was the wife's estate, there is a resulting trust for the wife.

Now, in the decision I come to in this case, I entirely adhere to that doctrine, which is clearly and well established.

But it is equally well established, that if there is sufficient indication of an *intention* to vary the limitation of the equity of redemption, that intention will be carried out. Nor is it necessary that there should be a specific recital of intention : the intention may be inferred without any express recital.

Now, consider what was the estate and interest of *Anne Rees*, the wife. By the limitations of the deed of 1st July 1817, she had jointly with her husband a power to appoint by deed. Except that power, her only interest in the estate was an estate for life in remainder expectant on her husband's life estate; if she survived him, she would become, under the deed of 1817, tenant for life in possession; but her interest under the limitation of the equity of redemption in the deed of 1832 was an interest of a higher kind; the limitation was to the husband and wife as joint tenants in fee; so that if she had survived her husband, she would have been tenant in fee. She had therefore a better estate under the limitations of the deed of 1832 than she had under that of 1817; she had not the less the joint power of conveying, not indeed by appointment, but by a deed properly acknowledged. It is not immaterial to consider that the limitations of the equity of redemption in the mortgage of 1832, increased the estate and interest of the wife: that in either case, if she died in the lifetime of her husband, she took nothing; but if she survived, by the deed of 1817 she would take only a life estate; by the deed of 1832 she would take the fee.

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There is another point to be considered, which is this: the persons who insist on their right to have a resulting trust declared for them under the limitations of the equity of redemption of the deed of 1832, are persons claiming through *W. Rees* the son, who did not join in the mortgage; and I am of opinion that no such equity arises in their favour. The estate of *W. Rees* the son, under the deed of 1817, was liable to be defeated; and by the deed of 1832, *Rees* the father and his wife have in terms defeated it. How, then, can he

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say there is a resulting trust in his favour? The equity in *Ruscombe v. Hare* does not exist here. In this case the person claiming it is a person who does not join, and whose joining in the mortgage security was not necessary. A person whose estate was liable to be defeated by the act of another, and whose estate is defeated, has no right to claim a resulting trust in his favour.

The point arose in *Anson v. Lee* (a), which is the same sort of case as this. In that case there was the same right in Sir *G. Anson* as there is in this case in *Rees* the younger. (The Vice-Chancellor referred to the passage in the judgment on this point, pp. 378 & 379 of 4 Sim.) I accede entirely to the doctrine there laid down; that case has always been considered good law; and I think that in principle it applies to this case.

But here we have a clear indication of intention, that the limitation shall be to the husband and wife, not only in the mortgage deed, but in the concurrent deed of assignment.

If the matter stood only thus, I should be of opinion that there is a variation of the limitation of the equity of redemption. But there is another ground, viz. that on which Lord Justice *Knight Bruce* decided the case of *Barnett v. Wilson* (b).

Nothing can be more marked than the variation of the language in the deeds in the case before me. In every one of the mortgages made before that of 1832 (except the mortgage to *Mostyn*, and the mortgages for terms)

(a) 4 Sim. 364.

(b) 2 You. & Coll. 407.

the direction in the proviso for redemption is, that the reconveyance is to be to the uses of the deed of the 1st July 1817. In the deed of 1832 the language is totally varied; although noticing that deed, and made under the powers created by it, the limitation of the equity of redemption varies entirely from the limitations in the prior mortgage deeds. That was the case in *Barnett v. Wilson*, and on that ground the Vice-Chancellor decided that case.

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On these grounds it appears to me that the deed of May 1832, reserving the equity of redemption to the husband and wife, was an exercise of the power of appointment, not merely for the purpose of securing the mortgagee, but for the purpose of appointing the fee to themselves. Consequently the claim of the Plaintiff cannot be supported, and the bill must be dismissed with costs.

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8th, 10th, and
13th June.

*Vendor and
Purchaser.*

Title.

Specific Performance.

BETWEEN JAMES FOSTER GROOM, HENRY
HUNT, DANIEL TITMUSS, and RICHARD
OAKLEY, Plaintiffs;

AND

JAMES HENRY JOHN BOOTH, Defendant.

A. and B., trustees of a stock fund in trust for A. for life, with remainder over to unascertained persons, sold out part of the stock, and lent it to B., who misapplied it. B. gave to A., by way of security, and indemnifying her, an equitable mortgage by deposit. B. then became bankrupt, and A. and B.'s assignees applied to and obtained from the Court of Bankruptcy, on a statement of these facts, but without making the

cestuis que trust of the fund parties, an order for sale. They sold, with a special condition referring to the petition and order in Bankruptcy, that the purchaser should only have the receipt and conveyance of A. and the assignees. Held, that A. and the assignees could make a good title without the concurrence of the *cestuis que trust* in the receipt or conveyance.

THIS was a special case for the opinion of the Court. It stated as follows:—By a contract entered into on the 8th July 1852, the Defendant contracted for the purchase from the Plaintiff of two freehold houses, with garden, &c., at the price of 710*l.*, subject to printed particulars and conditions of sale. To the said contract annexed, the sixth condition was as follows:—“The property comprised in these particulars is sold by order of the Court of Bankruptcy, under the direction of the assignees of *John Knight*, a bankrupt, upon the petition of *Elizabeth Hull*, the equitable mortgagee, and it is hereby expressly declared, that inasmuch as the Commissioner has adjudicated upon the said petition, all the facts and allegations contained therein, or in the order of the said Commissioner made thereupon, shall be deemed and accepted by the purchaser as sufficiently and satisfactorily established, without any further evidence or proof whatsoever, nor shall any such be required. And the purchaser shall pay the amount of his or her purchase-money and interest, if any, agreeably to these

conditions, to the said *E. Hull*, whose receipt alone shall be a valid discharge for the same, and such receipt shall exonerate the purchaser from seeing to or being in any way concerned about the application or appropriation of the purchase-money, or any part thereof, and from all responsibility on account of the same, and that the only persons who shall be required to join or concur in the conveyance or assurance of the property to the purchaser shall be the assignees of the said *J. Knight* and the said *E. Hull*."

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The Defendant duly paid his deposit; but the purchase was not completed on the day agreed upon, and has not yet been completed; and the Defendant, under the following circumstances, and subject to the declaration of this Court to be made in this matter, declines to complete the said purchase.

The Plaintiffs are the assignees in bankruptcy of one *J. Knight*, who at and before the time of his making the deposit hereinafter mentioned of the title-deeds of the aforesaid houses and premises now contracted to be sold, was seised thereof in fee-simple in possession, free from incumbrances, and so continued (subject to the said deposit) up to the time of his bankruptcy hereinafter stated. That *Samuel Hull*, by his will, dated the 19th November 1836, among other dispositions bequeathed to his wife *Elizabeth Hull*, the sum of 500*l.* stock in the then New 3*l.* 10*s.* per Cent. Bank Annuities, part of the 3950*l.* stock standing in the testator's name in the books of the Governor and Company of the Bank of *England*, for her absolute use; and the said testator by his said will afterwards proceeded in the words and figures following, that is to say, "I give and bequeath

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unto my said wife *Elizabeth Hull*, the interest and dividends to arise and grow due on the sum of 2500*l.* further part of the said sum of 3950*l.* stock aforesaid, for and during her natural life; and from and immediately after her decease, I give unto *John Knight*, (thereby meaning the said above-named *John Knight*, since bankrupt as above stated,) his executors, administrators, and assigns, upon trust, all that principal sum of 2500*l.*, equally to be divided amongst all my nephews and nieces then living;”—viz., “all the legitimate children of my brother *Stephen Hull*, and the legitimate children of my sister *Jane Bowcott*. And also, unto all the nephews and nieces of my said wife *Elizabeth Hull*, namely, the legitimate children of my sister *Eleanor Tucker*, and the legitimate children of my brother *William Howes*, and the legitimate children of my brother *Jeremiah Howes*, and of my sister *Ann Wolverton*, my niece, the widow of my late nephew *Thomas Parry*, excepted, share and share alike.” And the said testator appointed his wife the said *Elizabeth Hull* and the said *John Knight*, since bankrupt, executrix and executor. *Samuel Hull* died on the 7th November 1843, and left him surviving his widow *Elizabeth Hull*, and several nephews and nieces, of whom several are married women; and the said *Eleanor Tucker*, *William Howes*, and *Ann Wolverton*, are still living; and on the 23rd November 1843, the said will was duly proved by the said *Elizabeth Hull* and *John Knight*, in the proper ecclesiastical Court. The 2500*l.* 3*l.* 10*s.* per Cent. Bank Annuities was transferred into the names of *Elizabeth Hull* and *John Knight*, upon the trusts of the will. Subsequently to such transfer, and in the month of March 1844, *Knight* requested *Elizabeth Hull* to join with him in selling out

part of the said Bank Annuities, and to allow him to apply the proceeds to his own use, upon his giving to her his promissory note, and depositing with her, by way of equitable mortgage, the title-deeds of the said two freehold houses and premises, now contracted to be sold, and of which *John Knight* was then seised in fee-simple; to which proposal *Elizabeth Hull* agreed. On the 14th March 1844, *Elizabeth Hull* and *John Knight* joined in selling out 1000*l.* stock, part of the said 2500*l.* 3*l.* 10*s.* per Cent. Bank Annuities, and the net proceeds of such sale, amounting to 1020*l.* sterling, were paid to the said *John Knight* and applied by him to his own use. On the following day, *John Knight* gave to *Elizabeth Hull* his promissory note, dated the 15th March 1844, for 1000*l.* On the same day, he deposited with *Elizabeth Hull* the title-deeds of the said freehold houses and premises. At the time of making the deposit, *John Knight* also delivered to *Elizabeth Hull* a memorandum, dated the 14th March 1844, which was signed by him, and was as follows:—
 “March 14th, 1844. Memorandum. This is to certify that the title-deeds of the houses situated at *Pomona Place, King’s Road, Parson’s Green, Fulham*, lately occupied by Mrs. *Wellman*, deceased, and others, is placed in the possession of Mrs. *Hull*, to secure to her the payment of 50*l.* annually, for 1000*l.* 3*l.* 10*s.* per Cents. drawn from the stock standing in her name and *John Knight’s*, under the will of the late Mr. *Samuel Hull*, given to them in trust; and the said *John Knight* agrees to pay the above-named 50*l.* half-yearly unto Mrs. *Hull*, for which he has given a bill for the amount. Signed, *John Knight*. To Mrs. *Hull*, *St. John’s, Fulham*.” The said deeds were deposited for the purpose of securing and indemnifying *Elizabeth Hull* in

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respect of the income and principal of the said trust-monies.

No part of the principal sum of 1000*l.* stock has been replaced or repaid by *John Knight*, but all interest in respect thereof, in lieu of the dividends thereof, has been duly paid up to the time of the bankruptcy of the said *John Knight*. On the 4th November 1851, *John Knight*, with his nephew and partner, *John Knight* the younger, were duly adjudged bankrupts; and on the same day, the above-named Plaintiff *James Foster Groom* was appointed official assignee, and the above-named Plaintiffs *Henry Hunt*, *Daniel Titmuss*, and *Richard Oakley*, have also been duly chosen and appointed creditors' assignees of the estate of the said bankrupts. By an order of the Court of Bankruptcy, made on the 25th March 1852, on the petition of *Elizabeth Hull*, stating such of the above-mentioned matters as had then taken place, (save that the said Petitioner did not state who were the testator's nephews and nieces then, or whether they or any of them were or were not infants or married women,) and served on the Plaintiffs as respondents thereto, it was ordered that an account be taken of the principal monies necessary to replace the said sum of 1000*l.* 3*l.* 4*s.* (formerly 3*l.* 10*s.* per Cent.) stock, and of what was due to the said Petitioner in respect of her life interest therein; and that, for that purpose, all necessary accounts should be taken, and that the said houses and premises, the title-deeds whereof had been so deposited as aforesaid, being the houses and premises now purchased by the said Defendant, should be sold by and under the direction of the said Plaintiffs, the assignees of the said *John Knight*, and that all proper parties should join in such sale, and in the conveyance thereof

to the purchaser or purchasers thereof; and that the monies to arise by such sale should be applied in the first place in payment of the costs and expenses of such sale, and incidental thereto, and in replacing the said 1000*l.* 3*l.* 5*s.* per Cent. stock, and afterwards in payment of what should be found due to the said *Elizabeth Hull*, as aforesaid, for interest. And it was further ordered, that the costs of all parties, of and incidental to the said petition, should be paid out of the monies to be produced by such sale aforesaid.

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The *cestuis que trust* of the said sum of 2500*l.*, 3*l.* 5*s.* per Cent. Bank Annuities, other than the said *Elizabeth Hull*, were not served with and did not appear upon the said petition.

The said houses and premises were accordingly, on the 8th of July last, put up for sale by auction by the said Plaintiffs, and with the concurrence of the said *Elizabeth Hull*, and in pursuance of the said order, at the Auction Mart, in the City of *London*, subject to the conditions hereinbefore referred to, when the Defendant bid for and contracted to become the purchaser thereof, upon a good title being shown, in accordance with the conditions of sale.

Shortly after the said contract, and within the time limited for that purpose by the conditions of sale, the said Defendant, by his solicitor, duly notified in writing to the Plaintiffs or their solicitors, that he objected to complete his purchase, on the ground, that notwithstanding the conditions of sale, the purchaser must see to the application of the purchase-money; and he required that all the persons beneficially entitled in

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remainder to the said sum of 2500*l.* 3*l.* 5*s.* per Cent. Annuities, under the will of the late *Samuel Hull*, if they were persons ascertained and *sui juris*, and also the bankrupts, should join in the conveyance.

That, in answer thereto, the solicitors of the Plaintiff, on the 30th July last, by letter of that date, stated, as the fact is, that the said bankrupt would (if desired) join in the conveyance, and that no further objection is now raised by the Defendant on that point.

That the said solicitors of the Plaintiffs, in answer to the requisition of the said Defendant, that the persons beneficially entitled in remainder under the said will should concur in the conveyance to the Defendant, by the same letter stated, that it was intended to invest the balance of the purchase-money after paying the costs, in the joint names of the trustees under Mr. *Hull's* will, upon the trusts therein contained, of the said sum of 2500*l.* stock, the said parties entitled thereto in remainder being unascertained, and, as to some of them, under disability, as hereinbefore mentioned.

That this offer and reply were not considered by the Defendant to be a sufficient compliance with his requisition, and that some further correspondence ensued, and the opinions of counsel were taken on both sides, but without leading to any adjustment of the question between the parties; and that, on the 29th of October last, the said *Elizabeth Hull* having been advised by her counsel, that if the whole of the purchase-money were invested in the names of the said *Elizabeth Hull* and *John Knight* the elder, in the purchase of 3*l.* 5*s.* Bank Annuities, to be added to the sum of 1500*l.* like An-

nuities, the residue of the said sum of 2500*l.* stock, still standing in their names in the book of the Governor and Company of the Bank of *England*, and so to be held upon the trusts declared by the said will concerning the said sum of 2500*l.* like Annuities, so as to repair the breach of trust committed by the sale of the said sum of 1000*l.* stock as aforesaid, so far as the said purchase-money would extend, the said Defendant would clearly be discharged; and such opinion having been communicated to the said Plaintiff's solicitors, the said solicitors, on behalf as well of the said Plaintiff as of the said *Elizabeth Hull*, offered to the Defendant that the whole of the said purchase-money should be so invested, and that the purchaser might if he desired at once make the investment himself, and recite the same in his conveyance. That one of the purchaser's requisitions on the title was, for an abstract of the petition on which the said order in bankruptcy was made. That a copy of such petition was first furnished to the purchaser's solicitors on the 8th November, 1852, and on the 15th November, 1852, the purchaser's solicitors further objected to the title, on the grounds that, under the circumstances disclosed by the petition, the Court of Bankruptcy had not jurisdiction to make such an order, as it appeared by the petition that the mortgage-money was trust-money, and the order was made in the absence of the parties entitled to the fund. Ultimately, the above special case for the opinion of the Court was agreed upon, and the questions were—

First. Whether, under the circumstances aforesaid, the receipt of the said *Elizabeth Hull* and the said bankrupt, in their character of trustees of the said will of the said *Samuel Hull*, is alone a sufficient discharge to the Defendant for his aforesaid purchase-money,

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without the concurrence in such receipt, or in the conveyance to the said Defendant, of the persons beneficially entitled in remainder to the said sum of 2500*l.*, 3*l.* 5*s.* per Cent. Annuities, under the said will as above stated.

Second. Whether, under the circumstances aforesaid, if the net purchase-money, after deducting the expenses of and incident to the sale, and the said petition and order, be invested by or with the privity and concurrence of the said Defendant, in the purchase of Bank 3*l.* 5*s.* per Cent. Annuities, in the names of the said *Elizabeth Hull* and *John Knight*, to be held by them on the trusts declared by the said will concerning the said sum of 2500*l.* like Annuities, the said Defendant, the purchaser, would not be discharged from liability to see further to the application of the purchase-money, without such concurrence in the conveyance to him of the said persons so beneficially entitled as aforesaid. And if the Court should be of opinion that such investment of the said purchase-money will not discharge the purchaser from such liability, then, whether, if under the circumstances aforesaid, the whole of the said purchase-money, without making any such deduction therefrom as aforesaid, be invested in the manner and upon the trusts hereinbefore mentioned, the said Defendant will or will not be discharged.

Third. Whether, under the circumstances hereinbefore stated, such a title has been shown in the vendors, or offered to the purchaser, as this Honourable Court would compel a purchaser to accept; and whether the purchaser is or not bound to complete his purchase, and specifically to perform his said contract, on one and which of the investments above-mentioned being made.

The case now came on to be argued.

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Mr. *Bacon* and Mr. *Hadden*, for the Plaintiffs.

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They relied on the sixth condition, and the order in Bankruptcy. The condition has been accepted by the purchaser, and whether originally a proper one or not, it is binding on the purchaser.

But besides, a vendor may stipulate to sell on any terms (*Freme v. Wright (a)*). That was, like this, a case of assignees of a bankrupt selling under whatever title he had. If the purchaser knows that the vendor is a trustee or assignee, he is bound; and here the purchaser had clear notice of the vendors being trustees. (They cited also *Hume v. Bentley (b)*, *Wilkinson v. Hartley (c)*, *Franco v. Franco (d)*.) But, assuming that the condition of sale does not bind the purchaser, the case is clear, that where there is a trust for sale, express or implied, there is implied power in the trustees to give a discharge (3 *Sugd. Vend. & Pur.* 10th edit. p. 156, s. 1, c. 17, *Bredon v. Bredon (e)*.)

Mr. *Daniell*, for the purchaser.

This is a case of a clear breach of trust by the bankrupt and Mrs. *Hull*, which is not shown, or in any way referred to by the conditions of sale. Under the terms of the will, there are no powers to vary securities. By the act of both the trustees, in breach of the trusts, Mrs. *Hull* and the bankrupt have fastened on the real

(a) 4 Mad. 364.

(d) 3 Ves. 75.

(b) 5 De G. & Sm. 520.

(e) 1 Russ. & Myl. 413.

(c) 15 Beav. 183.

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estate, deposited with Mrs. *Hull*, the trusts of the trust estate.

The land stands in the place of the original trust fund, the stock; and there is no power or authority in the bankrupt and Mrs. *Hull* to part with the land, if the *cestuis que trust* choose to adopt it as their trust property.

The assignees are the legal owners; the parties beneficially entitled to the original fund are the equitable owners.

The cases cited on the other side were cases of trusts for sale, created by the instrument which gave the equitable estate, and the only question was, whether there was an implied power to give receipts. They do not apply to this case, where there is no power to sell. (They referred to *Sugd. Vend. & Pur.* 11th edit. p. 848.) Sir *E. Sugden* there treats the doctrine thus: that where trustees lend on the security of real estate in pursuance of their trusts and it is necessary to sell, there is an implied power to give receipts.

In the case cited by Sir *E. Sugden* there was no *express* power to sell; here it is much stronger, for there is here a clear breach of trust. This is not a question between Mrs. *Hull* and the bankrupt's estate, but between her and the *cestuis que trust*. At any rate, it would be a clear breach of trust to pay the costs of the petition to the Court of Bankruptcy out of the purchase-money—that cannot be permitted. As to the condition of sale binding the purchaser, it cannot bind him to accept a title on the face of it bad, *Warren v.*

Richardson (a). Again, as to the nature of the condition, the Plaintiff has cautiously avoided disclosing that this was a case of trustees and *cestui que trust*, and treats it as merely a case of mortgagee and assignees of mortgagor. The condition is ambiguous; it is not clear whether it meant to discharge the purchaser by the receipt of Mrs. *Hull*, as against the assignees only, or as against the *cestuis que trust*; the condition does not with any clearness point to the true difficulty; it is therefore a fraud on the purchaser. Such conditions must be construed strictly. (He referred to *Southby v. Hutt (b)*, to show the extent to which stringent conditions of sale would be held binding.)

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Mr. *Martindale* with him.

The purchaser has notice that there was originally a breach of trust; he has also notice that it is intended to apply part of the purchase-money, in breach of the trust. He cannot safely pay the money under such circumstances on the receipt of the trustees.

Then it is said, that this is a question of conveyance and not of title; that point is decided by *Forbes v. Peacock (c)*, which on that point has not been overruled or questioned. The consequence of the mode of investment adopted by the trustees, without any power to make it, was that the estate given as a pledge by one of the trustees to the other, was made part of the trust estate, at the option of the *cestuis que trust*. The original fund was not Mrs. *Hull's*, but the trustees', and the security taken inured for the benefit of the trust estate. Mrs. *Hull* had therefore no right to go to the Court of Bankruptcy

(a) 1 Y. Exch. 1.

(b) 2 Myl. & Cr. 212.

(c) 12 Sim. 528.

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to get an order for sale. (He referred to *Fosbrook v. Balguy* (a).)

The petition in bankruptcy, moreover, did not show to the purchaser that the trustees had no power to sell, and give receipts, nor that they had committed a breach of trust. The sixth condition of sale was fraudulent, because neither by itself nor connecting it with the petition, is it shown what was the true ground of the restriction.

Again, the order for sale is the Plaintiffs' only title, if it be a title, to sell; and it does not give them a right to insert special conditions. The terms of the order require that all proper parties shall join; the condition of sale is, therefore, in direct contradiction to the order, which, as observed, was the only title of the Plaintiffs.

As to *Wilkinson v. Hartley*, the Master of the Rolls decided that case solely on the ground that he was concluded by the decree, which directed the contract to be carried into effect, and he treated the condition of sale as part of the contract. As to *Hume v. Bentley*, this case comes within the doctrine there laid down, as to a fraudulent condition of sale.

Mr. Bacon, in reply.

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The case is stated on the other side as if the security when taken was to be treated as part of the testator's estate. That is not so; it is not charged as the testator's estate would have been. The very statement of the parties to the mortgage is, that it was given to Mrs. Hull as an *indemnity*; then *Knight* becomes bankrupt, and

(a) 1 Myl. & K. 226.

Mrs. *Hull* is simply an equitable mortgagee, having a right to realise. The security was given to her alone, as her personal security.

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The order of the Court of Bankruptcy fastens on the *proceeds* the character of trust-money.

Franco v. Franco (a) is directly applicable ; that case decides, that on one of two trustees, both being parties to a breach, coming against the other, to have the trust fund made good to him, the *cestuis que trust* are not necessary parties ; that is the case here, that is precisely what was decided and done by the Court of Bankruptcy in ordering the sale, and that Court had full jurisdiction. The petitioner stated the whole case to the Commissioner. The case then is simply this, a sale under the order of the Commissioner, exactly consistent with *Franco v. Franco*, the sale being, according to the practice, committed to the assignee.

The argument is, that no Court had power to sell in the absence of the *cestuis que trust*. If that were the consequence, the security might remain unrealised. If Mrs. *Hull* had filed a bill against *Knight* before the bankruptcy, she might clearly have had a decree without the *cestuis que trust*, according to *Franco v. Franco*. Then as to the condition of sale, it is said that it withdraws the attention of the purchaser from the true difficulty. The condition does give him notice of the petition. If he had asked for that, he would have seen the whole case. *Southby v. Hutt* does not apply here. There is neither misrepresentation nor concealment ;

(a) 3 Ves. 75.

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Wilkinson v. Hartley is expressly this case, as to the purchase being concluded by the condition of sale.

The meaning of the condition here is, you must take the title of the equitable mortgagee. Then it is said, that if a title on the face of it is bad, it will not be forced on the purchaser. But here the *title* is not bad. It is a mere question of the purchaser looking to the *application of the money*, and of the concurrence of the *cestuis que trust*.

The Court is in fact asked to consider this estate as trust estate, and for that purpose a passage in *Sugd., Vend. & Pur.* p. 848, is referred to. It is argued as if this was an investment; and that, there being no power to vary the securities, the trustees cannot realise. That would be most mischievous to the *cestuis que trust*.

Then, as to the order to pay the costs of the petition in the bankruptcy. If that order was—and it was—the only lawful mode in which the sale could be effected, the order for the costs was an incident to the principal order, and was proper.

THE VICE-CHANCELLOR.

In this case the question is, whether certain freehold estates which belonged to the bankrupt *Knight*, and which have been ordered to be sold by the Commissioner in bankruptcy, are in such a condition that a good title can be made; or whether, if the title is not absolutely bad, it is at least so doubtful, that this Court will not force it on a purchaser.

That the Commissioner had power to direct a sale

of the bankrupt's estate properly so called, is not in controversy. But it is said this was not the bankrupt's estate, but an estate on which a trust was fastened, in consequence of the improper sale of trust stock vested in the bankrupt and Mrs. *Hull* as trustees, and the investment of the produce on the security of these premises; and then it is contended that other persons besides the bankrupt had an interest in them; and it is said that Mrs. *Hull*, on petitioning for the sale of the estate, ought not to have obtained the order for sale in the absence of the parties beneficially interested in the trust fund, the produce of which was invested on the security of this property; and it is further contended, that even if the Commissioner had power to make the order, yet that a good title cannot be made unless all the *cestuis que trust* concur in conveying.

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These are, I think, the objections made by the purchaser; and if either of them is valid, a clear title cannot be made.

Now, the argument of the purchaser proceeds entirely on this, that this is a case in which certain moneys arising from the sale of a trust fund have been invested on the security of these premises. But it appears to me that that argument is without foundation; and that not only the petition to the Commissioner, but the statements of the special case, displace that argument. (The Vice-Chancellor referred to the passages in the special case (*ante*, p. 550-1).)

The former part of that statement would leave it in doubt whether the mortgage was intended as a security for the *cestuis que trust*, or for Mrs. *Hull* personally.

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(The Vice-Chancellor then referred to the memorandum (p. 551).) Now, in terms this is a deposit to secure the payment of 50*l.* a-year to Mrs. *Hull*. However, it was agreed between the parties that it was intended as a security to her for the replacing of the principal fund. And then follows this statement:—"The said deeds were deposited," &c. (The Vice-Chancellor referred to the passage (p. 551).) The parties therefore agreed that it was a deposit to secure and indemnify Mrs. *Hull*. The meaning of it is plainly this: Mrs. *Hull* has concurred in the breach of trust; both she and Mr. *Knight* were, and each of them was liable; as between them, *Knight* admits that he ought to replace the fund, and to indemnify her, and he gives her this deposit for *indemnifying her*.

That is also the statement in the petition for sale, which, according to the sixth condition of sale, is to be taken to be true.

The 1000*l.* stock never was replaced. (The Vice-Chancellor then referred to the order made on the petition in bankruptcy (p. 552).)

None of the *cestuis que trust* except Mrs. *Hull* were, it seems, served with the petition. The premises were put up for sale, under several conditions of sale, among which was the sixth (*ante*, p. 548). The purchaser attended, and was declared purchaser for 710*l.*

Now, the first point is this: Was this transaction an investment of the trust-moneys on the security of the property in question? I think it was not. It was not an investment of the trust-money at all. The security

was not given to secure the trust-money, but as an indemnity by one trustee to another trustee joining in committing a breach of trust, against any loss which might be incurred by the trustee so concurring in the breach of trust. On that ground, I should be of opinion that there is no foundation for the objection made by the purchaser; and I think that the purchaser, paying his money to Mrs. *Hull*, (still more if the purchase-money be, as it is proposed, invested in the names of the two trustees,) and taking his conveyance from the assignees of *Knight* and from Mrs. *Hull*, could not be touched in any manner hereafter by the *cestuis que trust* of the original trust fund.

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But the case goes further. The sixth condition, it is contended, is so framed as to mislead the purchaser—to keep out of sight, although professing to describe, the facts; and if that were so, this Court would certainly not enforce such a condition. I agree also in the proposition, that if enforcing the performance of this contract would cause a breach of trust, this Court would not enforce it.

But, firstly, as to the condition of sale, although it might certainly on the face of it, at the expense of great and unnecessary length, have set out the statements of the petition, yet as it provides that all the facts stated in the petition shall be taken to be true, how can it be said that there is any concealment? The purchaser is required by it to take such title as Mrs. *Hull* and the assignees can give. He is told that all the statements in the petition are to be taken to be true. This was an invitation to the purchaser to say, “If am to be bound by those facts, let me see the petition.” There is in

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this case indeed no allegation, and nothing to show that the purchaser did not actually see the petition; but, however that may be, he had distinct notice of it, and might have called for it before he entered into the contract. I am of opinion that the sixth condition contains no suggestion from which any inference of concealment or fraud can be collected.

Will, then, enforcing the purchase under this sixth condition be, or lead to a breach of trust? It is said that it will, because that condition of sale involved the application of the produce of the sale in paying the costs of the petition in bankruptcy, and that, it is said, will be a misapplication of the money.

Now I do not see how that would be a misappropriation of the money, even if the transaction had been an investment of the trust-money on the security of the mortgage; for if it was the necessary and legal course of proceeding to apply to the Court of Bankruptcy to realise the estate, it would not be a breach of trust for that Court to order the costs to be paid out of the fund. But it was simply an indemnity, and it was therefore right and just that the costs of the petition should be paid out of the trust fund, and it will be no breach of trust to make that application of a portion of it.

I may also observe, that the sixth condition of sale, so far from being objectionable, was a perfectly reasonable one under the circumstances set out in this case; for the case states facts, according to which it cannot without great difficulty be ascertained who are the *cestuis que trust* of the fund; it was therefore a very reasonable provision to make, that Mrs. Hull should receive the pur-

chase-money and give a receipt, not requiring the concurrence of any other person. The very terms of the condition invited the attention of the purchaser to the facts, and it is not for him now to complain that there was any deception.

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There remains the question whether the Commissioner had jurisdiction. The argument is, that admitting he had jurisdiction if all the *cestuis que trust* joined, he had none in their absence. Now I am of opinion that he had a right to make the order without the *cestuis que trust* being before him. He had the petition that stated the circumstances of the case; showing what were the transactions in respect of which the security was given to Mrs. Hull; showing the breach of trust by Knight and Mrs. Hull; and showing that there were *cestuis que trust*, who were not before him. I think the principle of *Franco v. Franco* was a distinct authority for his proceeding; for if this Court would, in *Franco v. Franco*, dispense with the presence of the *cestuis que trust* and overrule the demurrer, the Commissioner in Bankruptcy, who clearly had the jurisdiction of ordering a sale, might make the order without the presence of *cestuis que trust*.

I am of opinion therefore, Firstly—that the Commissioner had jurisdiction, and made a proper order in directing the sale, and in directing the costs to be paid out of the trust fund; Secondly—That it was competent and proper for Mrs. Hull and the assignees to insert the sixth condition of sale; Thirdly—That that condition is free from the objection made to it; and Fourthly—that a good title can be made by Mrs. Hull and the assignees of the bankrupt conveying without the *cestuis*

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que trust joining in the conveyance or in giving a receipt.

The specific questions in the special case were directed to be answered accordingly.

The First, affirmatively.

The Second, affirmatively as to the first alternative, which rendered it unnecessary to answer the second alternative.

The Third, affirmatively.

BETWEEN THOMAS HERMITAGE DAY, of *Rochester*, in the County of *Kent*, Banker, Plaintiff;

AND

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2nd and 3rd
June.

Will.
Construction.
Annuities.

EDWARD DAY, JOHN DAVID DAY, ANNA MARY DAY, HENRY HOOPER DAY and MARGARET ELIZABETH DAY, the three infant Children of DAVID JOHN DAY, deceased, by JOHN TONGE, their marital Uncle and Guardian; MARY ELIZABETH DAY, Widow, the Administratrix of DAVID GEORGE DAY, deceased, another Child of the said DAVID JOHN DAY, deceased; CHARLES JAMES FRANKLIN NEWTON and PENELOPE his Wife, PENELOPE SMITH DESPARD NEWTON and ISABEL OWEN NEWTON, the infant Children of the said PENELOPE, by William Carnegie, their Guardian; and MARY ELIZABETH DAY, the Widow of the said John Day, deceased, Defendants.

Testator gave his residue to his wife for life, and after her decease one-seventh of it to each of six of his children; he gave the other seventh to be laid out in government annuities for his son *A.* for life, to be paid into his hands from time to time, without power of anticipation; with a limitation over in the event of his being bankrupt, insolvent, &c., in the lifetime of the testator or after his death. *A.* died in the lifetime of the tenant-for-life, not having been bankrupt, &c. Held, that his representatives were entitled to one-seventh of the residue.

THIS was a special case for the opinion of the Court. It stated as follows:—*David Hermitage Day*, late of *Rochester*, by his will, bearing date the 29th day of June 1842, after giving certain specific and pecuniary legacies, gave, devised, and bequeathed all his freehold, copyhold, and leasehold messuages, tenements, lands and hereditaments, with their appurtenances, and all the residue of his personal estate and effects whatsoever, unto his wife *Mary Ann Day*, and his sons, *Thos. Hermitage Day*, *James Day*, and the Rev. *John Day*, their heirs, executors, administrators, and assigns, upon trust, to pay the annual

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proceeds thereof to his wife, the said *M. A. Day*, for her life, and after her decease, upon trust, for sale and conversion, and to stand possessed of his said residuary estate. As to one seventh part thereof, in trust for the said *Thomas Hermitage Day* absolutely. As to another seventh part, in trust for the testator's son, *Edward Day*, absolutely. As to another seventh, in trust for the said *James Day* absolutely. As to another seventh, in trust for the said *John David Day* absolutely. As to another seventh, in trust for such of the children of the testator's deceased son, *David John Day*, as, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry. As to another seventh, upon trust to lay out and invest the same in the purchase of a government annuity for the life of the testator's son *Charles Day*, and upon further trust to pay such annuity when and as the same shall become payable, to him my said son, *Charles Day*, but not by way of anticipation, to him my said son, *Charles Day*, for his life, for his own use. But the testator declared, that in case his said son *Charles Day* should have assigned, incumbered, or in any manner disposed of or anticipated, or should at any time or times thereafter assign, incumber, or in any manner dispose of or anticipate the said annuity so to be purchased as aforesaid, or any part thereof, or in case his said son *Charles Day* should at any time or times thereafter, and either before or after his the said testator's death, become bankrupt, or take the benefit of any Act of Parliament for the relief of insolvent debtors, or do or cause to be done any other act, deed, or thing which could, should, or might affect or incumber the said annuity, then, and in any or either of the said cases, the said testator declared and directed that the trustees or trustee for the time being of that his will should thence-

forth hold and stand possessed of the said annuity, upon trust for his sons, *Thomas H. Day*, *James Day*, and *John David Day*, their executors, administrators, or assigns, for their own use. And as to the remaining seventh, in trust for *Penelope Newton*, for her life, for her separate use, without power of anticipation, and after her decease, for such of her children as, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, with a gift over; in default of such children, to the said *Thomas H. Day*, *Edward Day*, *James Day*, and *John D. Day* equally. And the said testator appointed his said wife and his sons, the said *T. H. Day*, *James Day*, and *J. D. Day* executrix and executors of his said will.

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The testator, *David H. Day*, died on the 5th day of June 1843, leaving the said *Mary Ann Day* his widow, and his will was proved by the said *Thomas H. Day* alone, in the Prerogative Court of Canterbury, on the 29th day of June 1843. *Charles Day* survived the testator, *D. H. Day*, and died on the 23rd day of January 1844, in the lifetime of the said *Mary Ann Day*, the widow. He never did any of the acts upon which the said will provides that his annuity should pass over to his three brothers, and his estate was perfectly solvent at the time of his death. He made his will on the 28th day of August 1841, and appointed the said *Edward Day* and *James Day* the executors thereof; and the said *Edward Day* alone proved the same in the Prerogative Court of Canterbury, on the 15th day of February 1844.

The said *Mary Ann Day*, the widow, died on the 26th day of February 1852, and by her will, dated the

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24th day of October 1851, appointed the said *Thomas Hermitage Day* and *David John Day* executors thereof, who proved the same in the Prerogative Court of Canterbury, on the 5th day of April 1852. The testator, *David H. Day*, had no real estate vested in him at the time of his death.

Under these circumstances, it is doubted who is entitled to the one-seventh share of the testator's residuary personal estate which was given for the purpose of purchasing an annuity for *Charles Day*, and which, under the circumstances aforesaid, had not been so laid out, and the same is now claimed by four classes of persons.

1st. The persons to whom the annuity is given over in the events mentioned in the will of the testator, *D. H. Day*, or their representatives.

2nd. The persons who at the death of *D. H. Day* were entitled to his personal estate as in case of intestacy, or their representatives.

3rd. The other residuary legatees of the testator *D. H. Day*, or their representatives.

4th. The personal representatives of *Charles Day*.

The first of these classes consists of the Plaintiff *Thos. H. Day*, in his own right; the Defendant, *John David Day*, and the Plaintiff, *T. H. Day*, being the legal personal representatives of *James Day*, who survived the testator, but died some time since.

The second class consists of the Plaintiff *Thomas H. Day*, and the Defendant *John Day*, as the legal personal

representatives of the said *Mary Ann Day*, the widow ; the Defendants *Anna Mary Day*, *H. Hooper Day*, and *Margaret Elizabeth Day* (being the only children of the said *David John Day*, except one other, *David George Day*, who survived the testator, but died in his infancy), the Defendant *Mary Elizabeth Day* (the mother of the said *David George Day*), and who is the legal personal representative of the said *David George Day* ; the Plaintiff *Thomas Hermitage Day* in his own right, the Defendant *Edward Day* in his own right, the Defendant *John D. Day* in his own right, the Defendant *Edward Day*, as the sole surviving executor of the said *Charles Day*, and the Defendants *Penelope Newton*, and her husband the said Defendant *Charles James Franklin Newton*.

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The third class consists of the Plaintiff *Thomas Hermitage Day*, in his own right ; the Defendant *Edward Day*, in his own right ; the Plaintiff *Thomas H. Day*, as the legal personal representative of the said *James Day* ; the Defendant *John David Day*, in his own right ; and the Defendants *Anna Mary Day*, *Henry Hooper Day*, *Margaret Elizabeth Day*, *Penelope Newton*, and *Penelope Smith Despard Newton*, and *Isabel Owen Newton*, the only children of *Penelope Newton*.

The fourth class consists of the Defendant *Edward Day* alone.

The question for the Court is,

To which of the above-mentioned four classes, or to whom else does the seventh share of the residuary estate

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of *David Hermitage Day*, given to purchase an annuity for *Charles Day*, belong?

The VICE-CHANCELLOR was of opinion, 1stly, That the parties claiming under the limitation over, took nothing; the events on which the limitation was to take effect, not having happened.

2ndly, That the legatees of the six-sevenths were in terms confined to seventh shares; and that the failure of *Charles Day's* seventh, if it failed, could not increase their seventh shares, to sixth shares.

3rdly, That *Charles Day*, if he had survived the tenant for life, would have been entitled, and his representatives were entitled, if there were nothing more than the question of the direction to pay him an annuity expectant upon the death of the tenant for life, to have the fund directed by the testator to be invested to purchase the annuity.

4thly, That the direction to pay to him only as the annuity should accrue due, by way of restraint on anticipation, was void, and did not alter his interest; and that it was not affected by the limitation over in the event of his becoming bankrupt, &c., either in the lifetime or after the death of the testator; consequently that *Charles Day* took a vested interest, which had never been defeated, and his representatives were entitled to one-seventh of the fund.

The costs of all parties out of that one-seventh.

Mr. *Bevir*, for the persons to whom the annuity was given over in the events mentioned in the will.

Mr. *Hobhouse*, for the personal representatives of
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Mr. *Woodhouse*, for the residuary legatees of the testator.

Mr. *Smythe*, for the second class, the next of kin of the testator.

The cases cited were, *Yates v. Compton* (a), *Barnes v. Rowley* (b), *Bayley v. Bishop* (c), *Dawson v. Killett* (d), *Palmer v. Craufurd* (e).

(a) 2 P. W. 308.

(d) 1 Br. C. C. 119.

(b) 3 Ves. 305.

(e) 3 Swans. 482.

(c) 9 Ves. 6.

1853 :
2nd April and
7th May.

Will.
Construction.

LORD v. WIGHTWICK.

THIS was a suit by *Lucy Lord*, (by her next friend), the daughter of *Thomas Devey Wightwick*, the testator in the cause, against *Stubbs Wightwick* and others, for the administration of his estate.

A testator seised
of real estate,
and leasehold
and personal

The will of *T. D. Wightwick*, was as follows :—

estate, and, among other property, of leasehold collieries or mines, gave certain real estates to his son ; he devised and bequeathed all his other real and personal estate upon trust, *with the approbation* of his son, at some convenient and proper period to sell and convert the same, and to invest and apply 1000*l.*, part thereof, for his granddaughter ; and after giving some small annuities, in trust to pay to his daughter 200*l.* a-year, besides one-half share of the yearly income and produce of his real and personal estates ; his intention being that she should enjoy an equal yearly income with his son during her natural life, treating 200*l.* a-year as equivalent to the real estate given to his son ; provided that his daughter's annuity should in no case exceed 600*l.* a-year ; and that the overplus, after 600*l.* a-year to her, and 400*l.* to his son, should go to his son, but that what he called produce of his personal estate was not to be taken as the income derived from the mines, but the profit arising, after laying by 10*l.* per cent. to pay back the capital expended in plant, &c. ; and subject to these gifts and devises he gave all his real and personal estate to his son ; the son was appointed, with the trustees, executor ; they disclaimed and renounced, and he entered into sole possession. In taking the accounts of the testator's estate : Held, that the son had a right to apply in payment of debts, all permanent personal property before disposing of the mines.

That, having paid off with his own moneys debts which could not have been paid off without resorting to the mines, the debts so kept alive in his hands were a charge on the net produce of the mines.

That the accumulations of the 10*l.* per cent. were a fund liable to the debts in exoneration of the mines.

That, as to any liabilities due to him in respect of overpayments of debts made by him beyond the assets applicable, he would be entitled to interest.

That the 1000*l.* legacy to the granddaughter was a charge on the real and personal estate *pro rata*.

"This is the last will and testament of me *Thomas Devey Whitewick*, as follows: First, I do hereby give, devise, limit, direct, and appoint unto my son *Stubbs Wightwick*, all such part of my farm at *Little Bloxwich*, in the county of *Stafford*, in the possession of *Francis Hildick*, as was part of the settlement made upon my late dear wife, and also the *Birchin Fields*, situate at *Harden*, near *Bloxwich* aforesaid, and a certain meadow called *Bentley Meadow*, and all other the lands, tenements, and hereditaments which were settled upon my said late wife, and of which I have a power of limitation by and under my said wife's settlement; to hold unto my said son *Stubbs Wightwick*, his heirs and assigns for ever. Also, I give, devise, and bequeath unto my friends, *John Fryer* of *Kingslow*, in the county of *Salop*, gentleman, and unto *William Tarratt* the younger, of *Wolverhampton*, in the same county of *Stafford*, merchant, and to their heirs, executors, and administrators, all and singular my real and personal estate and effects of what nature or kind soever (save the settled estate as aforesaid), and wheresoever the same may be, to hold to them and the survivor of them, upon the special trust and confidence that they the said *John Fryer* and *William Tarratt*, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall at some convenient and proper period, *with the approbation of my said son Stubbs Wightwick*, absolutely sell and dispose of all and singular my said real and personal estates and effects, and after converting the same into money stand possessed thereof for the purposes in this my will, or in any codicil hereafter to be by me executed, named, or to be named, that is to say, by the ways and means aforesaid, or by mortgage thereof, or out of the rents and proceeds, if more convenient, raise the sum of 1000*l.*, and place the same out at interest, or

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invest it in the Funds for the benefit of my granddaughter *Cecilia Lord*, as hereinafter mentioned; and subject to the said sum of 1000*l.* to the use of my said granddaughter, upon trust, that my said trustees, and the survivor of them, and the heirs, executors, and administrators of such survivor, do stand seised and possessed of my said real and personal estate, for the purpose of raising and paying in the next place one annuity or yearly sum of 80*l.* per annum unto my housekeeper *Ann Beech*. And subject as aforesaid, for the purpose of raising and paying to my daughter *Lucy Lord* such an annuity or yearly sum, for and during the term of her natural life, as shall be 200*l.* a year, over and besides one half share of the yearly income and produce of my real and personal estates (exclusive of the settled estate so hereinbefore limited to my son), my intention being that my said daughter shall have and enjoy an equal yearly income with my son, during the term of her natural life, choosing to reckon (perhaps a little overdone) the estate I have hereinbefore limited to him in fee, and which was his late mother's jointure, at 200*l.* a year. And it is my wish and desire, that the said annuity to my daughter be paid to her quarterly, by equal quarterly payments at Lady Day, Midsummer Day, Michaelmas Day, and Christmas Day, the first payment to be made on such of the said quarter days as shall first and next happen after my decease; and that the receipt of my said daughter for the said annuity, notwithstanding her present or any future coverture, shall at all times be a discharge to my said trustees for the same, and that such annuity shall not be liable to the debts, control, or engagements of her present or any after taken husband: provided, nevertheless, that it is my wish and intention that my said daughter's annuity shall in no case exceed the sum of 600*l.* per annum; and

that any overplus in produce of my real and personal estates so given and devised to my said trustees, after payment of 600*l.* a year to my daughter, and 400*l.* a year to my son, shall go and be paid to my said son. And I wish it to be understood by my said trustees, that what I call interest and produce of my personal estate is not the income derived from the mines, but the profit arising after laying by and deducting thereout at least 10 per cent. per annum, to reimburse and pay back the capital expended in the plants, and necessary wear and tear. And my mind and will further is, that the interest of the 1000*l.* so hereinbefore given to my said trustees for the benefit of my granddaughter, shall be applied by them in the maintenance of my said granddaughter until her age of twenty-one years, or day of marriage, which shall first happen, when the said sum of 1000*l.* shall be paid to her for her absolute benefit and disposal; and subject to the raising the said sum of 1000*l.* for the benefit of my said granddaughter, to the said annuity of 80*l.* per annum to my said housekeeper, and said annuity so not to exceed 600*l.* per annum to my said daughter, I do hereby give, devise, bequeath, direct, limit, and appoint all my real and personal estate and effects, whatsoever and wheresoever, unto my said son *Stubbs Wightwick*, his heirs, executors, administrators, and assigns; to hold to him my said son *Stubbs Wightwick*, his heirs, executors, administrators, and assigns for ever, and to and for no other use, trust, intent or purpose whatsoever. And I beg leave to state to my said trustees, that although I have apparently placed a great burden on their shoulders, yet it must be obvious to them that my son, on satisfactorily securing out of any specific parts of my property, my granddaughter's, daughter's, and housekeeper's respective moneys and annuities, he may be let into the actual possession and management of the

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whole of my property, without throwing any particular trouble on my said trustees. And I do hereby appoint my said son *Stubbs Wightwick*, and the said *John Friar* and *William Tarratt*, executors of this my last will."

The bill was filed by Mrs. *Lord*, the daughter of the testator, for an account of his real and personal estate, and to ascertain what she was entitled to in respect of her annuity. A decree for the usual accounts was made in 1845; the Master, after various interlocutory proceedings, had made his report; and the cause now came on, on further directions.

The Defendant had remained in the possession and management of the testator's property since his death, had paid off his debts, some of them with the Defendant's own moneys, and had kept the collieries in hand, and worked them.

The questions in the cause arose as to the footing on which the accounts were to be taken; and the nature of these questions, and the facts on which they rest, are fully stated in the judgment.

For the Plaintiff.—The *Solicitor-General*, Mr. *Malins*, and Mr. *Welford*.

For the Defendant.—Mr. *Campbell* and Mr. *C. Barber*.

On the 7th of May the VICE-CHANCELLOR delivered the following judgment:—

In this case the principal question to be decided is, whether the produce and profits of certain leasehold mines, called the *Teviotdale Colliery*, ought to have been

applied in payment of the testator's debts. To dispose of this, it is necessary to consider the will of the testator.

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The will is not artificially drawn ; but it is not difficult to arrive at the general intention.

The testator was entitled to some real estate at *Great Bloxwich* ; he had also, it seems, a power to appoint another freehold at *Little Bloxwich* ; he had a leasehold colliery and coal-mine at *Teviotdale*, certain shares in a canal navigation, and some personal estate.

In this state of things he made his will, dated about three weeks before his death, in March 1828.

(The Vice-Chancellor referred to the material clauses of the will, and proceeded)—

Now, one question which has arisen on the construction of this will is, whether the leasehold collieries or mines are exempted from the trusts for sale, by the clause relating to the 10 per cent. The devise is of all the testator's real and personal estate ; it embraces, therefore by those terms, the mines, as well as every other portion of the property. Notwithstanding this general devise, no doubt the testator might have exempted from the operation of it any given part of his property ; but has he, by the clause setting apart 10 per cent., excluded the mines from the trust for sale ? I think he has not. True, if the clause directing the application of the income of the mines alone were considered, although that clause contemplates a state of things in which the mines would not be sold, it does not make that state of things imperative, but contemplates that the mines might or might not be sold. The devise

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to sell, is to sell at some convenient and proper period, and with the approbation of the son. That period might not have arrived for some time after the testator's death; the son might not approve of the sale till some time after the testator's death; and during that period the mines must, if not sold, be carried on, in order to yield a profit. Because the testator introduces this clause, applicable to the state of things during any period for which the mines should not be sold, I cannot consistently put on the will the interpretation that I am to hold this particular property as excluded from the power which in terms embraces the whole property. But I do think the sale of the colliery, or indeed of any other portion of the property, was only to take place for the purposes of the will, with the approbation of Mr. *Stubbs Wightwick*.

It is to be remarked that, on the face of the will, the testator nowhere adverts to the payment of his debts; he does not in the slightest manner advert to the fact that he would probably die indebted. Now, it is impossible to attribute to this testator the idea that at his death he would have no debts. I must assume, on the contrary, that he had in contemplation the fact that he owed considerable debts; they could not be less, in fact, than 20,000*l.*, or thereabouts; but even if I could attribute to him the idea that he would have no debts, still, as there were debts in fact, they must be paid; and if no particular course is directed by the testator, they must be paid in the ordinary course of law; and I must assume that the testator disposed of his residuary property only after payment of his debts, according to the due course of law. Of course his personal estate would be first applicable; and his real estate, if the personalty proved deficient.

But I think that, as to the collieries, *Stubbs Wightwick* had a right to say that, unless required for the payment of debts, they should not be sold. I think he had a right to say that the permanent personal estate should be first applied. He did, as far as I can collect from the schedule, realise out of the general personal estate (not including the collieries nor the canal shares) between 5000*l.* and 6000*l.*; and he had a right, in virtue of the testator's will, to apply that first. So he might, I think, have resorted to the canal shares. These, however, it seems, still remain unsold. Then, supposing all the personal property, other than the collieries, had been applied in payment of the debts, there would still have remained several thousand pounds of debts, which could not have been paid without resorting to the collieries; and then the real question is, had *Stubbs Wightwick* a right to say, "I will out of my own moneys pay the remaining debts (thereby, of course, preventing the creditors from taking legal steps against the testator's estate to compel the payment of their debts); I will not allow the collieries to be sold to pay them; I will keep them alive as debts; and when the leasehold mines are exhausted, and I shall have received some 20,000*l.* from them, I will say I have the debts as my own property, and I come upon the real estate, or any other permanent estate remaining, to be paid the amount of debts which I have for my own benefit, as well as that of the Plaintiff, so kept alive?"

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Now it is to be observed, that though the testator appointed Messrs. *Prior* and *Tarrett* to be joint executors, the execution of the trusts devolved in fact entirely on *S. Wightwick*, who was the devisee in trust of the whole real and personal estate. *Prior* and *Tarrett* unfortunately disclaimed, and consequently the whole legal estate and interest vested in *S. Wightwick*, and

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the whole conduct and direction of the estate fell into his hands, and he has managed it so as to make a very large property out of the collieries. Had he, then, a right to avail himself of such his absolute dominion to say he would keep the testator's debts alive? He has in fact paid all the debts, except a certain debt secured by a mortgage of the canal shares, and a mortgage debt of 1682*l.*, charged on the collieries, and two other sums, arising out of certain liabilities of the testator's estate. He has paid altogether about 10,632*l.* These debts he has kept alive.

Now suppose the trustees had acted: what would they have done with regard to the property under the circumstances? Supposing there had been no approbation of Mr. *S. Wightwick* necessary for the sale, they would first have converted all the other property into money, and then they would have sold this property, the collieries; so, if any creditor had filed a bill, this Court would have sold the collieries if the debts could not have been paid without. Mr. *Wightwick* had no doubt a right to say they should not be sold without his approbation; that is, so far as it would not have been necessary to sell them for payment of debts, he had that right. But, can he go on after paying the 600*l.* a year to Mrs. *Lord*, and the 400*l.* a year to himself, retaining large sums out of the proceeds of the mines, to the amount of 20,000*l.*, and say, that shall not be applied at all in payment of debts? Now, it appears to me that I must consider the value of the collieries, as I cannot now ascertain what they would have sold for, in this way. There has been about 30,000*l.*, or deducting the 10*l.* per cent. set apart, about 27,000*l.* the result of annual net profits; that is, the colliery has brought to the testator's estate a net sum of about 27,000*l.*; and I

must, I think, treat that as the value of the colliery. Then, supposing that after applying all the other property to pay debts, there was a deficiency, say of 8000*l.*, (the deficiency can be and must be ascertained,) I ought, I think, to consider that as a charge which must be paid out of the 27,000*l.*

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Now, though it would appear at first sight that the effect of this view of the case is adverse to the interest of the Defendant, there follow several consequences, which will show that it is not quite so adverse to his interest.

One of these consequences is, that the personal estate, including its due proportion of income arising out of the mines, will have to be applied towards the liquidation of the debts. But the testator directed 10*l.* per cent. to be set apart. Now the capital formed by that becomes part of the testator's personal estate, and Mr. *Wightwick* has a right to say that it is applicable to the payment of debts. The Master has reported the amount of the fund produced by the 10*l.* per cent., to be 3832*l.*, and that amount Mr. *Wightwick* may require to have applied in payment of the debts.

Another consequence of the view which I have taken is, that if on the accounts being taken, it shall appear that there have been any balances due from time to time to Mr. *Wightwick* from the estate, in respect of over payments by him on account of debts, he will be entitled to interest on those balances.

Another consequence is this: if the testator had devised his real and personal estate in trust to pay debts, and then upon the other trusts of the will, his debts

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would have had to be paid out of his real estate *pro ratâ*; not having done that, his personal estate is of course first applicable; but one gift he has made payable *pro ratâ*, out of both real and personal estate; that is, the 1000*l.* made payable to Mrs. Lord; as to that sum, Mr. *Wightwick* has a right to have it charged on the real and personal estate *pro ratâ*.

The VICE-CHANCELLOR then summed up the points decided, as follows:—

The personal estate is first applicable to pay the debts in exoneration of the real estate. Secondly, With regard to the payment of debts, Mr. *Stubbs Wightwick* has a right to have applied in payment of those debts permanent personal property, in exoneration of the wasting personal property which consisted of the leasehold mines. Thirdly, The 10*l.* per cent. deduction to be set apart to restore capital, with its accumulations, constitutes personal estate, which Mr. *Stubbs Wightwick* has a right to say shall be applied to pay the debts in exoneration of the wasting property. Fourthly, In respect of any balances which shall upon the taking the further account, which must unfortunately be taken, appear to be due to Mr. *Stubbs Wightwick*, in respect of over payments for debts beyond the assets applicable to the payment, he will be entitled to interest upon all those balances. Fifthly, With regard to the 1000*l.* legacy to Miss Lord, it is to be a charge *pro ratâ* upon the real and personal estate.

LANE v. HORLOCK.

THE bill in this case was filed by *Richard Kirkman Lane* against *Isaac John Horlock* and *Sarah Rew* and *Quincey Rew*, the representatives of *Joseph Quincey*. It stated that in the year 1843, *Isaac John Horlock*, then of the *Rooks*, in the parish of *Marshfield*, in the county of *Gloucester*, Esq., but now of the city of *Westminster*, one of the Defendants thereto, was introduced to the Plaintiff by Mr. *John Foster*, then of *Jermyn Street*, *St. James's*, *Westminster*, the said *Isaac John Horlock's* then solicitor, with a view to Plaintiff's affording the said *Isaac John Horlock* pecuniary accommodation in the way of discount. That the Plaintiff discounted two bills of said *Isaac John Horlock* accordingly, both drawn by Plaintiff upon and accepted by said *I. J. Horlock* in favour of Plaintiff, payable respectively three months after date thereof: one thereof being dated the 22nd day of April 1843, and for a sum of 298*l.* 10*s.*; the other thereof dated the 8th day of August 1843, and for a sum of 225*l.* 6*s.* 6*d.*; the former of which, at the date of the warrant of attorney thereafter referred to, had been dishonoured, and still remained unpaid, the interest having been paid up to the date of the warrant of attorney, and the latter of which bills was then still current. That, having been, in the month of October 1843, applied to by the said *I. J. Horlock* for further discount, Plain-

1853 :
27th April
and
2nd May.

Judgment.
Usury.
Warrant of
Attorney.
Security on
Land.

Money was lent upon bills of exchange at usurious interest; the lender, by way of further security, took a warrant of attorney to confess judgment, expressly stipulating that he should be at liberty to enter up judgment immediately; and he did enter up judgment within twenty-four hours; he had previously made minute inquiries as to the amount and value of the borrower's real

estate. Held, that this was a security on land within the Usury Act, and the judgment could not be enforced against the proceeds of the sale of the land.

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tiff agreed to advance him a further sum of 800*l.*, on the terms of his the said *I. J. Horlock* giving to Plaintiff the said *I. J. Horlock's* bills at three months' date for the same, and the amount due on the former bills, with interest thereon respectively, and by way of discount of such fresh bills respectively, and on having as well such bills as what might become due from him to Plaintiff on any future bills, and whether given by way of renewal of the former bills, or otherwise collaterally secured, to the amount of 2000*l.*, by the warrant of attorney of him the said *I. J. Horlock*, for a judgment to be entered up against him at the suit of Plaintiff in a sum of 4000*l.* ; the bills, however, being taken as the primary security, and the warrant of attorney only being given as a security for payment of the bills. That, in conformity with said arrangement, Plaintiff, on the 25th of the said month of October, paid to said *I. J. Horlock* the sum of 800*l.*, and the said *I. J. Horlock* gave to Plaintiff three several bills of exchange, dated respectively the same 25th day of October, drawn by Plaintiff upon and accepted by the said *I. J. Horlock*, and payable to Plaintiff or his order three months after the date thereof respectively, two thereof being for the sum of 500*l.* each, and the third thereof for the sum of 528*l.* 7*s.* 6*d.*, and constituting together the aggregate amount of the said two former bills and the said advance of 800*l.*, and such interest as aforesaid, together with the costs of the warrant of attorney and stamps, after a rebate of interest for the time which had then still to run of the said former bill of 225*l.* 6*s.* 6*d.* And the said *Isacc John Horlock* gave to Plaintiff the warrant of attorney of him the said *I. J. Horlock*, dated the 25th day of October 1843, for entering up judgment in a sum of 4000*l.* against the said *I. J. Horlock*, in an action in the Court of Queen's

Bench at the suit of Plaintiff, with a defeazance indorsed on the said warrant of attorney, providing that such judgment should be for securing the payment by him the said *I. J. Horlock* to Plaintiff of any sums of money not exceeding in the whole the sum of 2000*l.*, which might from time to time thereafter be due to Plaintiff upon any and every bill of exchange or promissory note which should be made, drawn, or accepted by the said *I. J. Horlock*, and be discounted for him or for his use by Plaintiff, with interest on such bills and notes overdue, so that the whole amount of such bills or notes to be recovered under or by virtue of the same indorsement should not exceed the sum of 2000*l.*, and the costs of judgment, and of any execution thereon. That, contemporaneously with the transaction of the giving of the bills and the execution of the said warrant of attorney, an account of the transaction was made out by Plaintiff, and handed to the said *I. J. Horlock* for his examination, and approved. And the said *I. J. Horlock* having examined and approved the same accordingly, signed it, in token of such approval, and then delivered it back again to Plaintiff, and the account annexed by way of schedule to the bill was a copy of the said account. That, on the 26th day of the said month of October, and under the authority of the said warrant of attorney, Plaintiff signed judgment against the said *I. J. Horlock*, on the said action, for the said sum of 4000*l.*, and such judgment was on the same day registered in the office of the Senior Master of the Court of Common Pleas, according to the form of the statute in that behalf provided. That none of the said three several bills of the date of the 25th of October 1843 were paid at their maturity; and it being inconvenient to the said *I. J. Horlock* then to pay the same in money, it was agreed between the said

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I. J. Horlock and Plaintiff, that in satisfaction, and by way of payment thereof, the said *I. J. Horlock* should give to Plaintiff bills of the said *I. J. Horlock* at three months' date, to the aggregate amount of 1754*l.* 14*s.* 6*d.*; and accordingly the said *I. J. Horlock* delivered to Plaintiff three several bills, bearing date respectively the 26th day of January 1844, drawn by Plaintiff upon and accepted by the said *I. J. Horlock*, payable respectively to Plaintiff or his order three months after the date thereof, two thereof for the sum of 500*l.*, and the third for the sum of 754*l.* 14*s.* 6*d.*

That, on the arrival of the three last-mentioned bills at maturity, the same were all dishonoured, and at the date of the two bills next thereafter mentioned remained, as they have ever since remained, unpaid. That there being at the respective dates of the bills next thereafter mentioned a large sum then due to Plaintiff in respect of the interest of the said three last-mentioned former bills, and it being inconvenient for the said *I. J. Horlock* to pay either of the said former bills, or such interest as aforesaid, it was agreed between Plaintiff and the said *I. J. Horlock*, that by way of payment of such interest, and as an inducement to Plaintiff to forbear enforcing immediate payment of the principal due on the said bills, the said *I. J. Horlock* should give to Plaintiff the two several bills next hereinafter mentioned; and accordingly the said *I. J. Horlock* delivered to Plaintiff two bills of exchange drawn by Plaintiff upon and accepted by the said *I. J. Horlock*, payable to Plaintiff or his order three months after the date thereof,—one thereof being dated the 1st day of June 1844, and for the sum of 175*l.* 12*s.* 6*d.*, and the other thereof being dated the 4th day of July, 1844, and for a sum of 351*l.*

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6s. 6d. That such two last-mentioned bills were dishonoured on their arrival at maturity, and have ever since remained unpaid. That the whole of the several five last-mentioned bills of exchange, and to the amount in the aggregate of 2281*l.* 13*s.* 6*d.*, now remain in the hands of the Plaintiff unpaid, with the interest thereon.

The bill then alleged the due registration of the judgment, on the 5th of October, 1848, and that such judgment was still in force.

It then stated that, at the time of the original registration of the judgment, *Horlock* was seised of real estate in *Gloucestershire*, subject in priority to the Plaintiff's demand, to a mortgage for 2000*l.*, vested in *Joseph Quincey*, deceased; and that Plaintiff's incumbrance was the next to *Quincey's*.

The bill then alleged, that in the early part of the year 1845, the said *Isaac John Horlock* ceased to employ the said Mr. *Foster* as his solicitor, and employed Messrs. *Richardson, Smith & Sadler*, of *Golden Square*, in the county of *Middlesex*, solicitors, as such, and he continued thereafter to employ them as such solicitors down to the final completion of the sales of the estates of the said *I. J. Horlock*, thereinafter stated; however, in the year 1849, the said Mr. *Smith* died, and the business of the firm of the said Messrs. *Richardson, Smith & Sadler*, on the decease of the said Mr. *Smith*, continued to be carried on by the said Messrs. *Richardson & Sadler*, and the said Messrs. *Richardson, Smith & Sadler*, acted as such solicitors in the matter of the sales, and of the several transactions relative thereto respectively subsequently stated, and in the general management of the estates and pecuniary affairs of the said *Isaac John*

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Horlock. That the said Messrs. *Richardson, Smith & Sadler*, during the life of the said Mr. *Smith*, and after his decease, the said Messrs. *Richardson & Sadler*, were employed by the said *Joseph Quincey* as his solicitors, and they acted as such from the year 1845, down to the time of and throughout the transaction of the sale in the bill mentioned to said Mr. Serjeant *Wrangham*, and the discharge thereof of the said mortgage vested in the said *Joseph Quincey* as aforesaid thereafter stated; and for sometime thereafter they acted as such in all transactions having reference to the said mortgage. That by means of their employment as such solicitors as aforesaid, the said Messrs. *Richardson, Smith & Sadler* became apprised of Plaintiff's said judgment in the early part of 1845.

It then stated, that in 1845, *Richardson & Sadler* moved in the Queen's Bench to set aside the Plaintiff's judgment, on the ground of usury, but failed. (This was the case of *Lane v. Horlock*, which will be found much commented upon in the argument); it then alleged that *Horlock* afterwards incumbered his real estate with various charges; then followed this statement: "That it was proposed by the said Messrs. *Richardson, Smith & Sadler*, and had been so stated to Plaintiff, as an inducement to forego proceedings on his said judgment as aforesaid, that as soon as a sale could be advantageously had thereof, the said estates of the said *Isaac John Horlock*, or a competent portion thereof, should be sold in discharge of the several incumbrances thereon." And, in the year 1847, an opportunity presenting itself of effecting a sale to one *Wynchcombe Henry Howard Hartley*, of a small outlying portion of such estate, it was arranged that such sale should be effected accordingly, on the terms of the produce thereof being applied in payment of a

certain prior mortgage then existing thereon, in favour of one *Captain Bowden*, the Plaintiff, and the executors of one *Jefferey Grimwood*, another incumbrancer on the estate joining in discharging the subject of sale from their said respective judgments, which they did by a deed, on or about the 16th day of April 1847; *Joseph Quincey* executed the same, however, only in the character of attorney of and on behalf of the original mortgagee, *Lewis Alves Biggs*, whose assignee he had become. The said Messrs. *Richardson, Smith & Sadler*, on that occasion, and for the security of Plaintiff, gave their undertaking in writing to the Plaintiff, bearing date the 22nd day of April 1847, to pay the said purchase-money to the said *Captain Bowden* in part payment of his said mortgage debt; the bill stated that such proposed sale was effected. It then stated a fruitless attempt to sell the remainder of *Horlock's* estates by auction, and afterwards a sale by *Horlock* or his solicitors *Richardson & Sadler*, without notice to the Plaintiff. It then stated that "in the course of the transactions aforesaid, a proposal had been made to Plaintiff by the said Messrs. *Richardson, Smith & Sadler*, as such solicitors of the said *Isaac John Horlock* as aforesaid, to accept a composition on his said debt, which had been declined by him; however, down to the time of the said sale to the said Mr. Serjeant *Wrangham*, it had been always understood between Plaintiff and the said *Isaac John Horlock*, and his said solicitors, that as far as the produce of the said estates of the said *Isaac John Horlock* should prove on the sale thereof adequate to the payment of such debt, to the extent at which the amount thereof might be arranged between Plaintiff and the said *Isaac John Horlock* or his said solicitors, it should be discharged out of such sale; but Plaintiff having declined to release his said judgment, except upon the terms of the same being paid

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in full, difficulty arose in effecting a sale, on the principle of a sale from the said *Isaac John Horlock*.

It then stated an arrangement by which the sale was to be, and that it was effected by *Quincey* as mortgagee, under a power of sale contained in his mortgage, and that the incumbrances prior to *Quincey's* being paid off out of the purchase-money, 5585*l.* 1*s.* 6*d.* remained in his hands to pay his own mortgage, and the incumbrances subsequent to his. Then followed this statement: "That the said sum of 5585*l.* 1*s.* 6*d.* so paid to the said *Joseph Quincey* as aforesaid, considerably and beyond the amount of upwards of 3000*l.* exceeded the amount due to him on his said security, and which sum so due, according to the admission of the Defendants, amounted to only the sum of 2089*l.* 19*s.* 4*d.*, and the same having been satisfied out of the said sum of 5585*l.* 1*s.* 6*d.*, the balance, which according to such admission amounted to a sum of 8495*l.* 1*s.* 2*d.*, became immediately on such payment liable, according to their respective priorities, to the satisfaction of the incumbrances on the said estate, subsequent to the said incumbrance of the said *Joseph Quincey* thereon. And the said judgment of Plaintiff being the first in priority of such incumbrances, Plaintiff became entitled to a lien on the same, to the extent of his said judgment. And the said *Joseph Quincey* became accordingly liable in respect of such his receipt as aforesaid, to the satisfaction of such lien thereout. And such balance was either paid over by the said *Joseph Quincey* to or retained by the said Messrs. *Richardson, Smith & Sadler* accordingly, but in their character however of solicitors to, and agents of the said *Joseph Quincey*, though as well the said *Isaac John Horlock* as the said Messrs. *Richardson, Smith & Sadler*, and both in their character of solicitors to the said *I. J.*

Horlock, as on their own behalf, and on behalf of their said clients who had so as aforesaid made advances to the said *Isaac John Horlock*, having it at the time in contemplation to attempt a compromise with the Plaintiff in respect of his claim, it was deemed by them expedient with reference thereto that the same should be retained in the hands of the said Messrs. *Richardson, Smith & Sadler*, until such compromise could be effected, and the said *Joseph Quincey* allowed the same to be retained by them accordingly."

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The bill then stated various matters for the purpose of showing that *Quincey* was a trustee for the Plaintiff, and that he or his estate was liable for the balance of the 5585*l.* 1*s.* 6*d.*, after satisfying his own mortgage: charging notice on *Quincey* of the Plaintiff's judgment, at the time of the payment to him of the purchase-money of *Horlock's* estate; and this the bill alleged to be either direct, or if not direct, constructive, by reason of *Richardson & Sadler* having notice, and being throughout the transactions of the release of April 1847, and of the sale (as the bill alleged), the solicitors of *Quincey*.

The bill prayed a declaration that the Plaintiff was entitled to a lien on the balance of purchase-money paid to *Quincey*, or to *Richardson & Sadler*, as his solicitors; that *Quincey* might be declared to have been personally liable to the Plaintiff at the time of his death for the Plaintiff's claim, and for all necessary accounts.

Horlock was admitted to be insolvent; the Defendants the *Reus*, the representatives of *Quincey*, were therefore the substantial Defendants.

They by their answer said they personally knew

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nothing of the matters alleged. With regard to *Richardson & Sadler* being the solicitors of *Quincey* in the transactions referred to, the answer of the *Reus* said, that *Richardson & Sadler* acted as such solicitors of said *Joseph Quincey* from the time in the said bill on that behalf mentioned, down to the month of January in the year 1846; and that in said month of January 1846, said *Joseph Quincey* employed Messrs. *Tustin & Barlow* as his solicitors, in preparing his will and in other matters of business, except as to his said mortgage on the estates of said *John Isaac Horlock*, the payment of which Defendants are informed and believe said *Joseph Quincey* obtained through said Messrs. *Richardson, Smith & Sadler*, as his solicitors; and they believe and admit that said Messrs. *Richardson, Smith & Sadler* did act as the solicitors of said *Joseph Quincey*, in the transaction of said original transfer to him of the securities under which he became such incumbrancer as aforesaid, and in the sale to said Mr. Serjeant *Wrangham*, and if any such release as alleged was made, in the transaction of such release; but Defendants cannot answer as to their information or otherwise, whether such release was or not made. (Of the release referred to, there was no evidence, except a draft purporting to be signed; this was objected to, and of course rejected.) They denied to the best of their knowledge any personal and actual notice to *Quincey* at any time, of the Plaintiff's judgment, or as to what had been done with the balance after paying *Quincey*; they denied that it ever came to the hands of *Quincey*, and they were ignorant to whom it had been paid.

There were three material questions in the cause:—

First. Whether the Plaintiff's security was not upon

land, in which case the interest being plainly usurious, the charge was bad.

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Secondly. Whether if the security was good, there was any liability in the *Rews*.

Thirdly. What was the effect of the release of 1847.

On the first point, evidence was gone into to show that when the Plaintiff was applied to to make further advances beyond the 298*l.* 10*s.* and 225*l.* 6*s.* 6*d.*, he stated that he should require a warrant of attorney by way of collateral security, with any bills of exchange which he might discount for said Defendant, *I. J. Horlock*; and the Plaintiff also stated, that he must be at liberty to enter up judgment upon such warrant of attorney, so soon after the execution thereof as he Plaintiff might be minded so to do. The said warrant of attorney was to secure the debt then owing to Plaintiff, and any new debts which said Defendant *I. J. Horlock* might contract with him the Plaintiff, the whole not to exceed a defined amount. The said Plaintiff required to be furnished with information respecting the rental, the valuation of the property, the incumbrances thereon, and the judgments (if any) affecting said property, before he decided whether he would make any further advance to said *I. J. Horlock*.

The evidence on this point did not however go beyond showing that the Plaintiff inquired minutely into the state of the landed property of the Defendant.

Mr. *Wigram* and Mr. *Goodeve*, for the Plaintiff, stated the case, and contended that *Quincey* had constructive

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notice of the Plaintiff's judgment; that it was clear, either he had received the surplus money produced by the sale, after payment of his own debt, or that *Richardson & Sadler* as his solicitors had received it; and in either case he was liable as a trustee for the Plaintiff.

On the question of usury, they argued that the very point had been decided in *Lane v. Horlock* (a), and in *Withey v. Gilliard* (b).

It must appear on the instrument itself that there was an intention to charge land; and that did not appear on the warrant of attorney or defeasance, in this case. Here there was no *security* on land at the time of the advances; the warrant of attorney was no *security*, but a mere authority to do an act, which in its consequence by force of law creates a security.

They cited *Colebrook v. Layton* (c), *Saltmarshe v. Hewett* (d), *Connop v. Meaks* (e), *Aberdeen v. Newland* (f), *Hawkins v. Gathercole* (g).

Then with regard to the release of April 1847, of which the Defendants said, that if there was such a release, it was a release as to all the lands of *Horlock*; that doctrine does not apply to a judgment. *Brace v. Duchess of Marlborough* (h), *Ex parte Knott* (i).

Mr. W. M. James, for the Defendant *Horlock*.

First. The Plaintiff expressly stipulated for power to

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| (a) 16 Law Journ. Q. B. 87; | (e) 2 Adol. & El. 326. |
| and 4 Dowl. & Lownd. 408. | (f) 4 Sim. 281. |
| (b) Ibid. notis, p. 424. | (g) 1 Sim. N. S. 63. |
| (c) 4 Barn. & Adol. 578. | (h) 2 P. Wms. 419. |
| (d) 1 Adol. & El. 812. | (i) 11 Ves.; see p. 617. |

enter up immediate judgment; that appears by the evidence, and judgment was actually entered up within twenty-four hours of executing the warrant of attorney; the whole was substantially one transaction, and the Plaintiff clearly looked to the land as his security.

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Secondly. The instrument does not cover the particular advances claimed. (He referred to the language of the defeasance). The judgment is therefore for bills which *shall be* discounted; now, the bills given in payment of the original bills, have never been discounted at all.

Mr. Glasse, for the *Rews*, contended that no notice whatever was proved against *Quincey*.

It did not appear that *Richardson & Sadler* were his solicitors at the time of the alleged release, for there was in fact no evidence that there was ever any such release; they were his solicitors in the matter of his own mortgage, and of the sale to Serjeant *Wrangham*; but that did not fix *Quincey* with notice of the Plaintiff's judgment.

He referred to *Barrington v. Collis* (a), the 13th sect. of 1 & 2 Vict. c. 110, and to *Rolleston v. Morton* (b). The Act of *Victoria* gives a specific charge on the land, and the warrant of attorney gives the creditor an immediate power of creating such a charge.

As to the case *Lane v. Horlock*, cited by the Plaintiff, it does not appear from the report that the circumstances here shown, were brought before the Court.

(a) 8 Law Journ. 175.

(b) 1 Dru. & War. 171.

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In *Beete v. Bidgood* (a), Lord *Tenterden* laid down the rule, that you are not to look at the form and words, but at the substance of the transaction.

With him, Mr. *Cairns*.

There are two principal points : First, whether the transaction is within the statute. Second, whether the bills in respect of which the claim is made, are within the warrant of attorney.

Now, on the first point, before the statute of *Victoria*, the question of usurious charges on land was regulated by the statute of *Anne*, which avoided the contract ; the case of *Thibault v. Gibson* (b) shows the effect of the statute of *Victoria* on the statute of *Anne*. Was, then, this transaction within the provision of the statute of *Victoria*? The taking the warrant of attorney and entering up judgment was one continuous transaction ; it was intended and stipulated that judgment should be entered up immediately, and it was so in fact.

He referred also to *Hodgkinson v. Wyatt* (c).

Hawkins v. Gathercole has no application ; what was decided in that case was, that if the statute of *Victoria* gives a charge, that must be carried into effect ; and if carrying it into effect is inconsistent with the provisions of the statute of *Elizabeth*, that is *pro tanto* repealed. But no such consequence follows here. It is quite consistent with a judgment generally being a charge, that it should, if tainted with usury, be void under the Usury Act.

(a) 7 Barn. & Cress. 453.

(b) 12 Mee. & Wels. 88.

(c) 4 Q. B. 749.

On the second point he commented on the language of the defeasance, as showing that only future bills discounted were contemplated ; then the transaction as to the bills given after the warrant of attorney, was not a discount ; the money had been advanced on the original bills ; they were not paid ; and the subsequent bills were taken instead of payment of the principal and interest due ; there was nothing like discount in the transaction.

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Mr. Goodeve replied.

Lane v. Horlock, in the Queen's Bench, was this very case, the same instruments and the same facts ; but if that were not so as to the facts, it is not the facts, *dehors* the instrument, that you must look at, but the nature of the instrument. Now there was no judgment given at the time of the advance, but only a warrant of attorney : that is not of itself a charge ; therefore the advance was not made on the *security* of lands ; something required to be done to create a security by virtue of the warrant of attorney, which might or might not be done. Suppose the Plaintiff on the day he took the warrant of attorney had died, without having entered up judgment and before judgment entered up by his representatives, the estates had been sold ; clearly a judgment after entered up, would have been no charge on the lands.

The cases on charging benefices apply ; *Hawkins v. Gathercole* shows, that although a warrant of attorney gives power ultimately to obtain a charge on a benefice, it is not within the statute expressly forbidding the charging of a benefice.

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In *Hodgkinson v. Wyatt*, cited for the Defendants, the warrant of attorney showed on the face of it that it was intended to charge the land.

On the second point, that the bills were not within the warrant of attorney and defeasance.

Can such an intention as that requisite for the construction contended for, be imputed to the parties? Can it be inferred, unless it is expressed beyond all doubt, that they did not intend the warrant of attorney to cover the original bills? If they did not, then there was no security whatever for the advances except the bills themselves; but on the language of the defeasance itself, the true construction is, not that the security is for bills which shall be *hereafter made and discounted*, but for money which shall *hereafter be due* on bills which shall be made and discounted, that is, money *hereafter due* on bills, whether *now* made or *hereafter* made. Besides, even if that were not so—if only the future bills were in contemplation, the bills given after the warrant of attorney were a discount transaction; the money originally advanced was a discount; the money never was paid; the giving up the old bills and taking new ones, was but a continuation of the original discount transaction.

On the 9th of July, the VICE-CHANCELLOR delivered the following judgment:—

In October 1843, *Lane* was the holder of two bills which had been drawn by him upon and accepted by *Horlock*; one for 298*l.* 10*s.*, which had fallen due on the 25th July preceding, and the other for 225*l.* 6*s.* 6*d.*, which would not fall due till the 11th November following. *Horlock* was the owner in fee of certain real

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estates of considerable value, but heavily mortgaged; and the interest of the mortgages having fallen in arrear, and *Horlock* being in embarrassed circumstances and unable to discharge the arrears, the mortgagees threatened to proceed to a sale of the estates. In this dilemma, *Horlock* requested his solicitor, Mr. *Foster*, to procure him an advance of money sufficient to enable him to discharge the arrears of interest, and save his estates from being sold. Accordingly, on the 21st October, *Foster* saw *Lane*, and applied to him to advance money to *Horlock* to enable him to pay the arrears of interest on the mortgages. *Lane* said, that for any further advance, he must have, in addition to any bills he might discount, a warrant of attorney on which judgment might be immediately entered up and registered, to secure the payment of such bills as he might then discount, and the two former bills, and any further bills he might thereafter discount for *Horlock*, not to exceed in the whole a sum to be defined; but that, prior to deciding whether he would discount any further bills, he must be furnished with a copy of *Horlock's* rental, and the valuation of the property (i. e. the landed estates), and the amount of all incumbrances thereon; and that *Foster* must write to him to inform him whether there were any and what judgments against *Horlock*, and the exact amount of the money he was required to lend. *Foster* accordingly very shortly afterwards sent to *Lane* the copy of the rental and valuation, and informed him there were no unsatisfied judgments. On the 23rd October, *Foster* called again on *Lane*, and went through (with him) the rental and valuation of *Horlock's* landed estates, and the then existing incumbrances thereon; and after such examination, *Lane* agreed to lend the required sum, and requested *Foster* to let him know the exact sum wanted, which *Foster* accordingly did. The amount to be advanced was 800*l*.

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On the 25th October, *Horlock* and *Foster* went together to *Lane*, who produced to *Horlock* a cash account which *Horlock* perused and signed. And thereupon *Lane* advanced *Horlock* the 800*l.*, and *Horlock* accepted three bills drawn upon him by *Lane*, each dated the same 25th October, and payable three months after date, for sums amounting to 1528*l.* 7*s.* 6*d.*, and executed a warrant of attorney to confess judgment against him in the Court of Queen's Bench in a sum of 4000*l.*, with a defeasance declaring that it was to secure payment of any sum not exceeding 2000*l.*, which should at any time thereafter be due to *Lane* upon any bills or notes which should be made, drawn, or accepted by *Horlock*, and discounted for him by *Lane*. The sum of 1528*l.* 7*s.* 6*d.*, for which the three bills were given, was made up by debiting *Horlock* with the 800*l.* then advanced, and three months' interest thereon at the rate of 60*l.* per cent. per annum, and with the two prior bills, and three months' interest thereon at the same rate of 60*l.* per cent. per annum, and with the expense of the warrant of attorney and stamps, but giving him credit for 4*l.* as a rebate of interest on the former bill, not then due, for the seventeen days which that bill had still to run. And this appeared on the face of the account rendered to *Horlock*. On the following day (26th October), judgment was entered up by virtue of the warrant of attorney and registered. The three bills fell due on 28th January, 1844; but two days before (26th January), three new bills were drawn by *Lane* upon and accepted by *Horlock*, by way of renewal of the three bills then about to fall due. They were dated 26th January, 1844, for sums amounting to 1754*l.* 14*s.* 6*d.*, and payable at three months after date. The effect of these new bills was to carry on the rate of interest on the three former bills for three months more, at the rate of 60*l.* per cent. per

annum. The three new bills fell due on the 29th April 1844, and were not paid. On the 1st June 1844, *Lane* drew and *Horlock* accepted another bill for 175*l.* 12*s.* 6*d.* at three months after date. This was for interest on the 1754*l.* 14*s.* 6*d.* And on the 4th July 1844, *Horlock* accepted another bill at three months for 351*l.* 6*s.* 6*d.*, which was also for interest. The aggregate of these five bills is 2281*l.* 13*s.* 6*d.*; and none of the bills have been paid. In November 1846, *Horlock* took proceedings in the Court of Queen's Bench, to set aside the judgment, on the ground that the whole transaction was void, by reason of the proviso in the stat. 2 & 3 Vict. c. 37. The Court, upon argument of the rule, refused to set aside the judgment: *Lane v. Horlock*(a). In April 1847, *Horlock* sold a part of his estates, and the proceeds of the sale were applied to pay off one of the early mortgages. *Lane* joined in the conveyance to the purchaser. In November 1848, a Mr. *Quincey*, who was a mortgagee of *Horlock's* estate prior to *Lane's* judgment, with a power of sale, sold the estate to Mr. Serjeant *Wrangham* for a large sum of money, out of which the mortgages prior to *Quincey's* were paid off, and the residue was paid to *Quincey*. The Plaintiff *Lane* alleges that this residue was much more than sufficient to satisfy what was due to *Quincey* on his mortgage; that *Quincey* had notice of *Lane's* judgment; and that he ought to have applied the surplus, after satisfying his own mortgage, in satisfying *Lane's* judgment, to the extent of 2000*l.* *Quincey* has since died; and the bill in this case is filed by *Lane* against *Horlock* and the executors of *Quincey*, praying a declaration that the Plaintiff is entitled by virtue of his judgment to a lien on the surplus which remained of the purchase-money received by *Quincey*, after satisfying the several mort-

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(a) 16 Law Journ. Q. B. 87; 4 Dowl. & Lownd. 408.
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gages, including *Quincey's* mortgage; and a declaration that *Quincey* was personally liable to pay Plaintiff the amount of such lien; and the relief which would be consequential on those declarations.

The principal questions arising in the case (though other questions have been raised in argument), are whether *Lane* was entitled by virtue of the judgment to a lien or charge upon *Horlock's* landed estates for the amount due on the bills, not exceeding 2000*l.*, and whether he is entitled to the assistance of this Court to enforce such lien against the proceeds of the sale of those estates.

That the transaction is such as would be altogether void for usury under the statute of Anne, there can be no question, nor had the Plaintiff's counsel suggested anything to the contrary. Their whole contention has been that the effect of the statute of 2 & 3 Vict. c. 37, is such as to entitle the Plaintiff to the relief he prays.

There were two previous statutes, exempting certain bills and promissory notes from the effect of the usury laws. The first was:

The 3 & 4 Will. 4, c. 98, s. 7, (August 1833), being an Act for conferring certain privileges on the Bank of *England*. And the 7th section enacts, "That no bill of exchange, or promissory note, made payable at or within three months after date, or not having more than three months to run, shall, by reason of any instrument taken then or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force, for

the prevention of usury." And it exempts parties from penalties.

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The other previous statute was 7 Will. 4 & 1 Vict. c. 80, (July 1837), which enacts in the same terms with respect to bills or notes made payable at or within *twelve months* from the date, or not having more than twelve months to run.

In 1839, was passed the stat. 2 & 3 Vict. c. 37, on the construction of which the present case turns. This statute introduced a new element into the law of usury ; for it not only enacted, that no bill or note not having more than twelve months to run, but that no contract whatever, should be void for usury ; subject, however, to an important proviso. The language of the Act is, "That no bill of exchange, or promissory note, made payable at or within twelve months after the date thereof, or not having more than twelve months to run, nor any contract for the loan or forbearance of money above the sum of 10*l.*, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay, or receive, or allow interest in discounting, negotiating, or transferring any such bill of exchange or promissory note, be void, nor shall the liability of any party to any such bill of exchange or promissory note, nor the liability of any person borrowing any sum of money as aforesaid, be affected by reason of any law or statute in force for the prevention of usury." (Then follow words exempting parties from the penalties of usury ; and then comes the proviso). " Provided always, that nothing herein contained shall extend to the loan or forbearance of any money upon security of any lands, tenements, or hereditaments, or any estate or interest therein."

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The first question then for determination is, whether the transaction of October 1843, was in fact a loan or forbearance of money on the security of *Horlock's* land, as the Defendants insist that it was. If it was, there can be no doubt that the Plaintiff cannot be entitled to the relief he seeks by this bill.

Now, in *Withy v. Gilliard* (a), where money was lent at more than 5l. per cent. interest on the security of a bill, and of a warrant of attorney to confess judgment, and no mention whatever was made of the borrower's land at the time of the transaction, and judgment was forthwith entered up, the Court of Queen's Bench refused to set aside the warrant of attorney.

If then the Plaintiff, when applied to for the loan, had simply required a warrant of attorney in addition to the bills, and nothing had passed on the subject of *Horlock's* landed estates, then on the authority of *Withy v. Gilliard*, the warrant of attorney and the judgment entered up thereunder would not be impeachable under the proviso in the Act. On the other hand, if the Plaintiff, when applied to for the loan, had said, "I will lend you the money, provided you will give me, in addition to bills, the security of *Horlock's* lands, such security to be effected by means of a warrant of attorney to confess judgment, upon which I may forthwith enter up judgment, and so obtain a charge upon his lands," I think it is equally clear, having regard to the decided cases, and the reasons given for those decisions, that in that case it would have been held to be a loan of money on the security of land, within the meaning of the proviso

(a) 4 Dowl. & Lownd. P. C. 424, note.

in the Act. Neither of those two supposed cases corresponds precisely with the present case, with respect to what passed between the parties; for on the one hand *Horlock's* lands were made the subject of discussion between *Foster* and *Lane* in negotiating the loan; nay, more, *Lane*, before deciding whether he would advance any money at all, required to be furnished, and was furnished, with further information as to the rental and valuation of *Horlock's* lands, and the incumbrances thereon; but on the other hand, not a word was actually said by either party, importing that the money was to be lent on the security of the lands. According to the evidence in the cause, what passed between *Foster* and *Lane* was in substance this: *Foster*, in applying to *Lane* for the loan, spoke of *Horlock's* landed estates, partly (as he says), because the loan was required to pay the interest on the charges, and partly to satisfy *Lane* that *Horlock* was a man of stability, and had the means of repaying the money which should be advanced; and these (he says) were his only objects for alluding to the landed estates. And *Foster* adds, that he gave the Plaintiff the information respecting the particulars of the landed property, to enable *Lane* to verify his statement as to *Horlock's* responsibility. And further, that the final arrangement was, that *Lane* should make the advance on the bills, with the warrant of attorney as a collateral security; but the security to be given to *Lane* was not in any manner based upon any arrangement or stipulation for charging *Horlock's* landed estates with the money to be advanced. The Plaintiff *Lane* was examined himself as a witness, and he states in his deposition, that *Foster* told him that *Horlock's* estate would be sold by the mortgagees, unless he could get about 800*l.* to pay the interest in arrear; that nothing was said by *Foster*, on the occasion of the proposal for the

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advance being made, respecting *Horlock's* estates being a security for the advance. And he says, that his object in requiring the information as to the particulars of the estate and charges thereon, was to enable him to judge whether, if the estates were sold, *Horlock* would have sufficient surplus to pay him (*Lane*) what he owed.

Now, when it is considered that by the Act of 1 & 2 Vict. c. 110, s. 13, a judgment operates as a charge upon all the lands of the person against whom it is entered up, and the judgment creditor is to have the same remedies as if such person had agreed in writing to charge the lands, I confess it does appear to me, to say the least, extremely questionable whether I ought to hold that a man who is about to lend money to another at usurious interest, and who, before he agrees to lend the money, requires to be furnished with all the particulars of the borrower's landed estates, their rental and valuation, and the amount of the existing charges and incumbrances thereon, and who, when he has investigated and satisfied himself upon all those heads, lends the money on the security of a warrant of attorney, upon which he may forthwith enter up judgment, which judgment when entered up will be a charge upon those very estates as complete as if the borrower had actually agreed to charge them, is entitled to claim the benefit of that charge, merely because, knowing (as *Lane* says he knew) that a charge upon lands would be void, he took the precaution in the negotiation to abstain most carefully from speaking in direct and express language of a security on land. I cannot help thinking that the effect of such a decision would be to authorize a gross and palpable evasion of the positive prohibitions of the Legislature. The professed usurer, of course, takes especial care to be armed at all points with respect to the usury

laws; and if, by simply guarding his lips from uttering the words "security on land," he may stipulate for that which the very next day or hour gives him a direct charge upon land, the clear and express intention of the Legislature may be violated at his pleasure by a flimsy evasion. I feel a strong impression that, if I were entirely unfettered by any decision on the point, I should arrive at the conclusion, that if an agreement made in express terms to give as part of the security for the loan a charge upon land is within the proviso of the statute of 2 & 8 Vict. c. 87 (as it clearly is), an agreement made, after a careful investigation by the lender of the rental and value of the borrower's landed estates, and the incumbrances affecting them, to give as part of the security for the loan that which the law declares to be a charge upon the land, ought to stand upon precisely the same footing; and that a court of justice ought not to suffer itself to be blinded to the truth of the case by the shallow pretence, that the lender only required the information as to the borrower's landed estates in order to be satisfied that, if the estates should be sold, the borrower would have a sufficient surplus of the proceeds of the sale left, after paying the mortgagees, to enable him to repay the loan.

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This case, however, came before one of the learned Judges of the Court of Queen's Bench, on the attempt made by *Horlock* in 1846 to set aside the judgment. The case is reported in 4 *Dowl & Lowndes*, Pr. Ca. 408, and 16 *Law Journ. Q. B.* p. 87. The learned Judge refused to set it aside. He stated, indeed, that it appeared pretty clearly from the affidavits, that though the loan was secured by bills, *Lane* would not have made it unless he had ascertained that *Horlock* was possessed of landed property, nor unless *Horlock* had consented to

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give the warrant of attorney which authorized the entering up of a judgment immediately. (I may observe, that a great deal more appeared from the affidavits than that *Lane* merely ascertained that *Horlock* was possessed of landed property.) But the grounds on which the learned Judge based his decision were, first, That though the judgment which might be entered up by virtue of the warrant of attorney would be a charge on the lands, the warrant of attorney itself contained no reference whatever to the lands, but merely authorized judgment to be entered up immediately; and secondly, That if an action had been brought upon the bills after they fell due, and the Plaintiff had forbore upon receiving a cognovit authorizing immediate judgment, with stay of execution, it could not be contended that that case would be within the proviso, and the forbearance upon the security of lands. With unfeigned deference for every opinion expressed by that learned Judge, I must frankly confess that neither of these grounds is satisfactory to my mind. With respect to the first (viz. that the warrant of attorney itself contained no reference to land), I would observe, that supposing the proposal and treaty for the loan to have proceeded from first to last on the basis of its being made on the security of *Horlock's* lands, and that *Lane* had examined into the rental and valuation thereof and the incumbrances thereon, and had even investigated *Horlock's* title, just as an intended mortgagee would do, but *Lane*, being aware that an actual mortgage would be void, had stipulated that the security on the land should be effected by means of a warrant of attorney to confess judgment—I cannot think it could be successfully contended that such a transaction did not come within the meaning of the proviso in the Act; and yet, the warrant of attorney itself would equally contain no reference whatever to land. And with respect to the

second ground (that if an action were brought on the bills after they fell due, there would be no illegality in taking a cognovit authorizing the entering up judgment immediately, and upon those terms forbearing to prosecute the action), the answer is, that in that case the agreement to give a judgment is no part of the original contract or arrangement under which the lender agreed to advance the money or forbear its payment, but the cognovit is given in respect of a debt valid by law, and actually become due and payable; and indeed there would be nothing to prevent the creditor in that case from taking an actual mortgage of land for that debt. I have felt bound to state why I cannot concur in the reasons upon which *Lane v. Horlock* was decided at common law. At the same time, I should feel great hesitation in deciding the present case on a ground which would conflict with the opinion of so eminent and learned a Judge. I therefore turn to the consideration of another ground upon which I think the Plaintiff is not entitled to the relief he prays, resting upon what I conceive to be the true construction of the Act, which construction, if adopted, is consistent with—I will not say all the reasons and dicta—but with the actual decisions in all the cases in which the Courts of law have refused to set aside the judgments, including *Lane v. Horlock*.

It might be inferred from some of the cases, that an opinion had prevailed that if part of the security given for a loan of money at more than 5*l.* per cent. interest was the security of land, the proviso in the statute had the effect of rendering void not only the security of the land, but the whole contract, bills and all. When some of those cases were cited in the course of the argument, it struck me that this could not have been the intention of the Legislature. It occurred to me that the intention

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of the Legislature in passing the Act, with the proviso, was simply that *land* should never be made a security for the loan of money at more than 5 $\frac{1}{2}$ per cent. interest, but that the loan itself should be valid, and that every species of property whatever, other than land, might be made the security for such loan; and that therefore, having in the prior part of the Act enacted, first, that no bill or note not having more than twelve months to run should be void by reason of the rate of interest agreed to be taken; and secondly, that no contract should be void by reason of such rate of interest, (which part of the Act, if nothing had been superadded, would have validated every sort of security for such loan, whether upon land or otherwise howsoever,) the proviso was introduced for the sole purpose of excepting from this universality the single security of land, and not for the purpose of declaring any intention, that not only the security on the land should be void, but that the giving or agreeing to give such security should vitiate and render void the whole transaction. The more I have considered the matter, the more strong is the conviction to my mind that this is the true and just and reasonable construction of the Act; and, taking into consideration the steps by which the Legislature gradually relaxed the prohibitions of the usury laws, first by 3 & 4 Will. 4, exempting only bills or notes having not more than three months to run; then by 1 Vict., extending the exemption to bills or notes not having more than twelve months to run; and at length, by 2 & 3 Vict., exempting all contracts whatever, with the special exception to the security of land,—it does appear to me, that to hold the whole contract void because one of the securities contracted for is the security of land, is to give a construction to the Act altogether beyond the intent and purpose of the Legislature. It is satisfactory to me to have found a case, decided by a

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Court of the highest authority, which justifies this view of the construction of the Act. It is the case of *Ex parte Warrington, re Leake*, 17 Jur. 430, which came before the Lords Justices, sitting in Bankruptcy. The facts were, that *Leake* gave to *Warrington* promissory notes to secure sums of money advanced to him by *Warrington*, with 6*l.* per cent. interest; and at the same time that each note was given, an agreement was made that *Leake* should secure the money advanced by a mortgage or charge on certain real estates of which *Leake* was lessee; and such mortgages were executed according to the agreement. *Leake* became bankrupt, and *Warrington's* claim to prove the amount of the notes having been rejected by the Commissioner, on the ground of usury, he appealed to the Lords Justices, and their Lordships reversed the decision of the Commissioner, and admitted the proof on the notes. In giving judgment, Lord *J. Turner*, after reading the clause in the Act, with the proviso, thus expressed himself (p. 432):—"The enactment therefore clearly validates the notes, (&c. &c. to) In my opinion, therefore, these bills are valid, and must be admitted to proof." Lord *J. K. Bruce* expressed his concurrence. Here, then, is a clear judicial assertion of the principle that the proviso in the Act was not intended to invalidate the whole transaction, but to invalidate it so far, and only so far, as relates to the security on land. To this principle I mean to adhere in deciding the present case, being satisfied that such is the sound and rational construction of the Act, and the only construction which really effectuates the intention of the Legislature. Adopting, then, this construction, it appears to me to follow, that in every case in which money is lent at more than 5*l.* per cent. interest upon bills and other securities, not being the security of land, and also on the security of land, a Court, whether of law or equity,

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is bound to uphold the transaction as to every part of it, except only as to the security on land, and that it is equally bound to refuse its assistance to the creditor to enable him to enforce the security on land; and that supposing, for example, a loan to be made at more than 5l. per cent. interest, and the parties to agree that it shall be secured by a bill or note not having more than twelve months to run, and by a deposit of goods, and also by a mortgage so charged on land, the transaction ought to be supported so far as relates to the bill or note, and the security on the goods, because so far it is expressly authorized by the Act; and the transaction ought to be held void so far, and only so far, as relates to the security on land, because that is expressly prohibited by the Act. Now, the nature and effect of a judgment is such, that it is capable of being enforced either against the person or the goods or the lands of the party against whom it is entered up. If, then, a judgment is one of the securities agreed upon between the lender and borrower on the occasion of a loan of money at more than 5l. per cent. interest, it is perfectly consistent with the Act of Parliament that the judgment creditor should enforce it by execution against the person of the debtor or against his goods; but it is, in my opinion, inconsistent with the Act that he should enforce it against the lands of the debtor. The judgment itself is valid, because the creditor may use it in a manner and for a purpose authorized by the Act; but the creditor ought not to be assisted in using it as a charge upon the debtor's land, for that is what the Legislature intended to prevent.

In this case, the Plaintiff comes to the Court and asks for its assistance to enable him to enforce against the land of *Horlock* (or, which is the same thing, against the proceeds of the sale of the land,) the judgment which was

one of the securities agreed to be given on the occasion of his lending the money to *Horlock*, at 60 per cent. interest. And, in my opinion, he is not entitled to that assistance.

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Being of this opinion, I have thought it unnecessary to advert to any of the other points which were argued.

The bill must be dismissed with costs.

JACKSON v. TURNLEY.

THIS cause was upon the demurrer of *Joseph Turnley*. The bill stated as follows :—

By an indenture of lease, made the 30th of December 1843, between the above-named Defendants, *James William Turnley*, *Joseph Turnley*, and *Robert Turnley*, of the one part, and *Samuel Jackson* and *John Knill*, of the other part, the hereditaments therein particularly described, and known as *Cox & Hammond's Quay*, on the shore or bank of the river *Thames*, in the city of *London*, were demised to the said *Samuel Jackson* and *John Knill*, their executors, administrators, and assigns, for the term of twenty-one years, to be com-

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 27th June.
 Pleading.
 Jurisdiction.
 Chancery
 Improvement
 Act,
 Construction of.
 A lease was granted by *A.* to two partners, the covenants being only joint at law. Bill filed by the representative of one of the lessees deceased, against the lessor, alleging

that the lessor claimed to have a right, under the covenants, against the Plaintiff, if a breach should arise, and praying merely a declaration that the Defendant had no right. A demurrer to this bill was allowed, notwithstanding the 15 & 16 Vict. c. 86, s. 50.

The meaning of that section is only to remove the objection that a Plaintiff, who might have consequential relief, prays merely a declaration of his right. It did not mean to entitle a person to have a declaration as to a claim which may be made by another, under circumstances which may or may not happen.

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puted from the 25th day of March 1842, under the yearly rent of 2500*l.* and subject to the covenants therein contained, on the lessees' part to be performed, the demise and the habendum respectively being to them as joint tenants, that is to say, by the following words:—
“Unto them, the said *Samuel Jackson* and *John Knill*, their executors, administrators, and assigns,” and the covenant for the payment of the reserved rent and all the other covenants in the said lease by and with the lessees, were joint covenants, without any words of severalty, and amongst the lessors' covenants was a covenant for renewal, which was to be made at the request of the lessees, or their assigns, or the survivor of them, his executors, administrators, or assigns, as by such indenture of lease will more fully appear.

The said leasehold property was, with other similar leasehold properties, taken for the purposes of a partnership then existing between the said *Samuel Jackson* and *John Knill* as wharfingers and warehousemen, under certain articles of partnership, dated the 13th day of August 1839, whereby it was agreed that they should be partners until the 25th of December 1865, being the day on which the last of their copartnership leases would expire, but that if either of the partners should depart this life during such term, then that the share of the partner so dying, of and in (amongst other things) the several leasehold wharfs and premises therein mentioned, and which included the property comprised in the said lease of the 30th day of December 1843, should belong to and become the absolute property of the surviving partner, who should pay the amounts therein mentioned to the executors or administrators of the deceased partner, and should pay and perform the rents, covenants, and agreements in the several leases of the said several lease-

hold premises reserved and contained, and indemnify the estate of the deceased partner against the same.

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The said *Samuel Jackson* departed this life in the year 1845, in the lifetime of the said *John Knill*, having duly made his last will and testament, in writing, duly executed and attested, whereby all his real and personal estate and effects were given to the Plaintiffs and the said *Thomas Ambrose White* (as trustees upon certain trusts), and whom he appointed his executors, and who have all proved such will in the proper Court, and acted in the execution of such trusts.

As between the estate of the said *Samuel Jackson* and the said *John Knill*, the said *John Knill* has always admitted and admits that he is the person liable to pay the rent and observe the covenants reserved and contained in the said lease of the 30th of December 1843; but in the administration of the estate of the said *Samuel Jackson* a difficulty has arisen, by reason of the said *Thomas Ambrose White* alleging that the estate of the said *Samuel Jackson* is, as between such estate and the lessors, liable under the said indenture of lease to the payment of the rent, and to the performance of all the covenants and agreements therein reserved and contained on the lessees' part, if the said *John Knill*, his executors, administrators, or assigns, should make default therein; and that a sufficient portion of the said estate ought, therefore, to be retained as an indemnity against such contingent liability; and in consequence thereof a large sum of money, part of the estate, has been, by direction of this Court, withheld from distribution.

Application has been made on the part of the Plain-

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tiffs to the said Defendants, the said lessors, by a letter as follows:—"47, Moorgate Street, 11th October 1852. Gentlemen,—Under an indenture of lease dated 30th December 1843, a certain wharf and premises, called '*Cox & Hammond's Quay*,' were demised by you (at the request and by the direction of Mr. *Henry Turnley*,) to Mr. *Samuel Jackson* and Mr. *John Knill*, for the term of twenty-one years from the 25th March 1842, at the annual rent of 2500*l*. Mr. *Jackson* died in November 1845, since which time Mr. *Knill* has been in possession of the premises. Being concerned professionally for the executors of Mr. *Jackson*, I shall feel obliged by your informing me, for their satisfaction, whether you have any claim under the lease in respect of the rent and covenants up to the period of Mr. *Jackson's* decease.

"Requesting the favour of an early reply,

"I remain, Gentlemen,

"Your obedient Servant,

"J. F. ELMER.

"To *James William Turnley*,

"*Joseph Turnley*, and *Robert*

"*Turnley*, Esquires."

To which, by the authority of the said last-named Defendants, and by their solicitors, the following letter and claim was sent in reply:—"Sir,—We are directed by Mr. *Joseph Turnley* to acknowledge the receipt of your letter of the 11th instant, inquiring if he and the other lessors had any claim on the executors of the late Mr. *Jackson*, in respect of the rents and covenants of the lease of *Cox & Hammond's Quay* granted to him on the 30th December 1843, up to the period of Mr. *Jackson's* decease, and to inform you that all rent due and prior to that event has been duly paid, and that he is not personally aware of any breaches of covenant prior to

that date; but he is merely a trustee of the property, and will have a claim on Mr. *Jackson's* executors for any such breaches of covenant as have been or shall be committed from the date of the lease to the expiration of the term, of which, of course, the executors will take due notice before they part with the estate of their testator.

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"Your humble servants,
"CHARLES DRUCE & SONS,
"Billiter Square, 16th Oct. 1852.

"To *J. F. Elmslie*, Esq., Solicitor,
"47, Moorgate Street."

That by reason of such claim the distribution of the estate of the said *Samuel Jackson* is impeded, and cannot be conveniently proceeded with.

That there is no claim or ground for claim by the said lessors in respect of any rent, or of any other matter or thing under or in respect of the said lease, prior to the death of the said *Samuel Jackson*.

The Plaintiffs prayed as follows:—

That it may be declared that, as between the said lessors, the Defendants *James William Turnley*, *Joseph Turnley*, and *Robert Turnley*, and the estate of the said *Samuel Jackson*, deceased, all liability of the said *Samuel Jackson*, his heirs, executors, and administrators, in respect of the rent and covenants reserved and contained in the said lease of the 30th of December, ceased at his death.

That it is not necessary, in administering the estate
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of the said *Samuel Jackson*, to make any provision in respect of the said alleged contingent liability, or of any other alleged liability whatsoever of the said testator's estate under the said lease.

That the Plaintiffs may have such further and other relief as the nature of the case may require.

Mr. *Druce*, in support of the demurrer.

The broad ground of demurrer here is, that it is not competent to parties interested in the estate of a deceased person, to make creditors of the estate, or persons claiming to be such creditors, parties to a suit for administering the estate. This is a suit in effect for ascertaining the claims on *Samuel Jackson's* estate, and to that the Plaintiffs have no right to make the lessors of *Jackson* parties, on the ground of their being creditors.

But here, on the statements of the bill itself, the lessors have no present claim. Their claim can only be in respect of future and contingent breaches of covenant. It is quite clear that the lessor himself could not file a bill in respect of such contingent breaches: *King v. Malcott* (a). How then can a bill, alleging his claim only on such ground, be sustained to have it declared that he has not the claim?

Besides, this bill is merely for a declaration of right, or more properly for a declaration that the Defendant has no right. Was such a bill ever heard of? Certainly no precedent of such a bill can be produced before the late statute, the 15 & 16 of the Queen, c. 86, s. 50;

(a) 9 Hare, 692.

and probably on that the Plaintiffs rely. But that section was never meant to give a new jurisdiction to the Court ; all that it does is to alter the form of a bill, to allow a bill to be sustained for a declaration of right, without consequential relief ; whereas before, the course of practice was never to make a declaration of right, but as a foundation for consequential relief. But the Act did not mean to give to the Court jurisdiction to declare a right in a case where no consequential relief could have been given before the Act. Here no such relief is possible. What the bill asks, is to declare that the Defendant has no claim. What decree for relief could be founded on that ? Such a case is not that contemplated by the Act, which meant no more than to give power merely to declare a right, in cases in which the Court had before jurisdiction to give relief, and does not give such power in a case where it cannot and never could give any consequential relief.

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Mr. *W. M. James* and Mr. *T. H. Terrell*, in support of the bill.

The Plaintiffs say the covenant in the lease is joint at law ; but it may be construed as several in equity (2 Will. Ex. 2nd edit. 1240). The Defendant, the lessor, has been applied to, to say whether he makes any claim ; he admits he does ; and the demurrer admitting the allegations of the bill, admits that the administration of the estate of the Plaintiff's testator is impeded by the lessor's claim.

Before the recent Act, a bill of this sort might be sustained ; if there were a claim in respect of a legal demand, a bill would lie for an injunction to restrain the claimant from proceeding at law. Why should not a

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bill lie to restrain the prosecution of an equitable claim? That, we say, might have been done before the Act. But if that is not so, at any rate the Act is adapted to this very case, a mere declaration of right. The very object of the Act is to dispense with the necessity of granting any relief, and to entitle the Court to declare the rights of the parties. It meant to give parties in a hostile suit just the same benefit of the opinion of the Court, that they could have by consent under Sir *G. Turner's* Act.

Mr. *Druce*, in reply.

The case of a bill for an injunction to restrain the enforcing at law of a legal claim, does not apply to this case. Such a bill would lie where a party threatened to bring an action to support a present legal claim; but if a party said, I will bring an action if a breach of covenant arises, no bill would lie on that ground. But this bill does not pray even a declaration of right; it prays a declaration in the negative, that the defendant has no right.

Before the Act it is certain that the Court would not make a mere declaration of right; *Clough v. Ratcliffe* (a); and the Act does not extend the jurisdiction, but only gives power to the Court to make a declaration of right without following it up by consequential relief, when before the Act it had power to give consequential relief. Here no case for consequential relief arises; the Defendant cannot be restrained from proceeding on a right which, whether it will ever arise or not, clearly has not yet arisen; and the Court can therefore make no declaration.

(a) 1 De G. & Sm. 164.

The VICE-CHANCELLOR :

This case involves a question of great importance, viz. whether the recent Act (the 15 & 16 Vict. c. 86) has established a right to an action declaratory, not merely to declare that the Plaintiff has a right, but that, as against the Plaintiff, a Defendant has no right.

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The demurrer was capable of being argued on two grounds. The first, I understand, is abandoned on both sides, viz. that on the statements of the bill, the Defendant has no right in equity under the covenant against the representatives of the deceased lessee, and therefore that the Plaintiff in equity has no right to the declaration that he asks. On the other hand, the Plaintiff might contend that his equity is this, that though the covenant is at law merely *joint*, yet in equity it may be treated as joint and several; and then the question would arise, whether the right of the lessor to sue the executors of the deceased partner, follows the right of the surviving partner to sue the executors of his deceased partner. On that ground the demurrer has not been argued; and for the purpose of deciding this demurrer on the ground on which it has been argued, I must assume that the lessors might have, I do not say have, but might have an equity against the executors of the deceased lessee.

The demurrer is argued, first, on the ground that there is no right in the executors of the deceased partner in such a case as this to bring the lessor before the Court to determine the question whether, if there should be a breach of covenant, the lessors would have a right to file a bill against the representatives of the deceased partner. It is clear that, as between the representatives of the deceased lessee and the lessors, there could be

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no consequential relief. If the declaration were made, there must be an end of it; no further relief can be given.

Now it has been argued that this Court, irrespectively of the Act, has been in the habit of making decrees containing a mere declaration of right. No authority is produced for that position; if that were indeed the course of this Court, what would have been the use of the Act? The case of *Clough v. Ratcliffe*, referred to by the Defendant's counsel, shows very clearly, and if that case had not been decided, I should have felt no doubt, that such never was the practice.

Then the question is, whether the Act gives jurisdiction. I have on this point no precedent to guide me, no decision or even dictum; I must therefore decide it on the Act itself.

Now it is urged that it would be extremely convenient, if whenever a party has reason to apprehend that another will make an attack upon him, he should be entitled to come to this Court, and to ask to be relieved from that danger, by having it declared by a decision that there is no such right; and if there were any case in which advantage would arise from such a jurisdiction, this would be a case well illustrating the convenience; nor do I see that from the exercise of it, any mischief could result to the Defendant.

But that is not the question that I have to decide: the question is, whether the Legislature intended to give the jurisdiction. And the first observation that suggests itself, not conclusive certainly, but not altogether without weight, is, that if the Legislature had intended to give such a jurisdiction to entertain a

species of action of declarator, it would have given to the Court power to make such declarations on legal, as well as on equitable questions; or if the intention had been to confine the powers of Courts of equity to equitable questions, it would have given a similar power to Courts of law upon legal questions.

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Another observation is this: that if the Legislature had meant to give the right, confining it to Courts of equity, still if it meant to give power to the Court to make a declaration of right and nothing more, the intention would have been very differently expressed. Observe what is the language of the statute. (His Honor referred to the 50th section.) It must be observed that the statute might have had in view this objection on the part of the Defendant, that the Plaintiff only asked, and *could only have*, a declaration of right. It might have had another objection in view, viz. that the Plaintiff has no right to bring the Defendant before the Court to litigate the question; not that the Plaintiff has no right to a declaration with consequential relief, but that, assuming he might have consequential relief, he has no right to bring the Defendant before the Court. Now, did the Legislature mean to deal with both these objections, or only with the first? Its only object might be to remove the objection, that though there is a right to sue, the Plaintiff has no right to have a mere declaration. But did it mean to say, further, anybody who has an apprehension that some day, in the happening of some possible event, another may make a claim against him, may institute a suit to have it declared that there is no ground of claim? I think, if I were to put this construction on the Act, I should not be justified by the words of the section; I should not be justified by anything in any other part of the Act.

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(His Honor referred to Sir *G. Turner's Act*, observing that when a question arose on the construction of an instrument, the parties *agreeing* might have it determined under that Act; and continued)—

I am of opinion that this question cannot be *litigated*; that the representative of a deceased lessee cannot file a bill against the lessor to litigate the question, whether, in the event of a breach of a covenant taking place, the lessor would have a right founded upon it; and I may observe that the last branch of the section is not unimportant. It says, "it shall be lawful for the Court to make binding declarations of right, without granting consequential relief." That seems to imply, that it contemplates a case in which the Court is capable of giving consequential relief. Here there is not merely no consequential relief asked, but none is capable of being given.

I am of opinion that the Act meant only to remove the objection that a merely declaratory order is asked by the bill. It meant this: when a person may have a right to property, the Court, though not asked to give relief by its decree, may declare that the party has such a right. It did not intend to authorize a declaration at the instance of a Plaintiff, that some person who claims a right, has no such right.

The demurrer must therefore be allowed.

D'ALMAINE v. MOSELEY.

THE question in this cause arose upon the residuary clause of the will of a Mr. *Hewson*, which was in the following terms:—"And as to all the rest and residue of my estate and effects, I give and bequeath the same to *W. Moseley, S. Edwards, W. Parkins, and M. S. Parnther*, in trust to collect, get in, and receive the same, and to invest the same and every part thereof in their names in the 3l. per Cent. Consolidated Bank Annuities, or other government stocks or funds, with power to alter, vary, and transpose the same at their discretion, and to pay the interest and dividends thereof to Mrs. *D'Almaine* for her life, for her separate use and benefit, independent of her present or any future husband, but without power to anticipate, &c., and from and after her decease to pay and divide the said residuary estate equally among such of the eight children of the said Mrs. *D'Almaine* as, being a son or sons, have attained or shall attain the age of twenty-one years, or, being a daughter or daughters, have attained or shall attain that age or marry."

The Plaintiffs were Mrs. *D'Almaine* and some of her children, who claimed the testator's real estate under the residuary clause. The testator died without leaving any heir.

Mr. *Chundless* and Mr. *F. Wood*, for the Plaintiffs.

The words *collect, get in, &c.*, apply, it is true, properly to personal estate; but the word *receive* does apply

1853:
6th July.

Will.
Construction.
What Words
pass
Real Estate.

A gift of all the residue of my estate and effects to *A., B. and C.*, upon trust to collect, get in, and recover the same, and invest in stock, and pay the dividends, &c., to persons beneficially entitled; *A. and B.* being also executors. Held, to pass real estate.

1853.
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to real estate; and the word *invest* raises an implied power of sale. The general principle is this: you must give effect to all the words of the will; you must look at the word "effects" as well as the word "estate;" the former includes all the personalty, *Campbell v. Prescott* (a), *Michell v. Michell* (b). The word estate would therefore be surplusage, unless it passed the real estate; and it must be held to be intended to describe the real estate. *Jongsma v. Jongsma* (c), *Barnes v. Patch* (d), *Hamilton v. Hodson* (e).

As to the subsequent limitations or directions, which it would be argued, applied only to personal estate, they referred to *Stokes v. Salomons* (f).

They cited also *Mower v. Orr* (g), *Affleck v. James* (h), *Pattenden v. Hobson* (i), *Churchill v. Dibben* (k), *Sanderson v. Dobson* (l), *Doe d. Evans v. Walker* (m).

Mr. *Cole*, for two of the Defendants in the same interest as the Plaintiffs, cited *Doe d. Evans v. Evans* (n).

If the words used are inapplicable to real estate, they are just as inapplicable to leasehold, which it is not contended does not pass.

Mr. *Wickens*, for the Crown.

It is clear that the words *estate and effects* may

(a) 15 Ves. see p. 507.

(b) 5 Madd. 69.

(c) 1 Cox, 362.

(d) 8 Ves. 604.

(e) 11 Jur. 193.

(f) 9 Hare, 75.

(g) 7 Hare, 475.

(h) 17 Sim. 121.

(i) 17 Jur. 406; and 1 Jarm.
on Wills, 657.

(k) 9 Sim. 447, *notis*.

(l) 1 Exch. 141.

(m) 15 Q. B. 28.

(n) 9 Adol. & El. 719; see
also *Davenport v. Colman*, 12
Sim. 588.

be cut down to mean personal estate only. The word *devise* does not occur anywhere in this will; only the words *give and bequeath*. There are no words of limitation. Unless, therefore, the real estate passes by the residuary devise, there is no other devise of real estate, to show that the testator had real estate in his contemplation. The word *proceeds* is not to be found here; all the words used are strictly and exclusively applicable to personal estate. I rest in this case principally on the inapplicability to real estate, of the limitations following the words of gift. (He cited *Doe v. Buckner* (a), *Doe v. Hurrell* (b).) The cases which have been cited all show that if the words which follow the gift, are only applicable to personal estate, it must be taken that the testator did not intend to pass real estate.

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D'ALMAINE
v.
MOSELEY.

As to the residuary gift passing leasehold estate, that goes to the executors by law. There may be in them a duty to convert; it is not, therefore, necessary to find in the words of the will any intention to convert the leasehold.

Mr. *Bacon* and Mr. *Shapter*, for the trustees and executors, took no part in the argument.

The VICE-CHANCELLOR, without calling for a reply :

The question here is between persons claiming under the residuary gift, and the Crown representing the interest, which, if there were an heir, would go to the heir.

As to the effect of the residuary clause, the question

(a) 6 Term Rep. 610.

(b) 5 Barn. & Ald. 18.

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 v.
 MOSELEY.

is, whether the language shows that the testator intended to pass his real estate, or only his personal estate.

It is entirely a question of intention. The general principles applicable to cases of this sort are well established: the difficulty is not in ascertaining the principles, but in their application; one rule is, that the word *estate* simply, is sufficient to pass *real estate*; but in most cases the word *estate* is not used simply; and another rule is, that, supposing that there is nothing in other parts of the will to control the meaning of the gift, the effect of the word *estate*, coupled with other words, is this: if the other words would without the word *estate* not be sufficient to pass the whole personal estate, the word *estate* will be considered as used to effect a complete passing of the *personal estate*; but if the other words are sufficient to pass *all* the personal estate, then the word *estate* must be read as intended to apply to *real estate*.

It is equally clear that, consistently with the general principles, there may be words in the will which show that the language used may have an interpretation different from their ordinary and proper interpretation; but the rule being that the word *estate* is sufficient to pass real estate, and the other words used in this case being *effects*, which is sufficient to pass *all* the personal estate, so far as the language is considered, *prima facie* the word *estate* here would comprise the *real estate*; and unless there is something in the will to show a clear indication of intention to use the word *estate* in a sense different from its ordinary legal sense, it must be read in that sense. The cases on this subject are very numerous, and not very easy to be reconciled; but the tendency of modern decision is to give less effect to *minute*

and trivial matters than was attributed to them in former times.

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MOSELEY.

Now in this case, it is said on the part of the Crown, that in the former part of the will there is no gift of any real estate; but it appears to me that to lay stress on that would be to rely on grounds too minute; and that no indication of intention is afforded by it.

The next point made is, that in the language used for giving the residuary property, the word *devise* does not occur. I think that also is no indication of intention: the word *give*, is quite as efficient as the word *devise*, to pass real estate, and is of quite as frequent use. Next, it is said that there are no words of limitation to the heirs; but neither are there to the executors; so that no particular intention can be gathered. It can no more be said that it was intended by omitting a limitation to heirs to exclude real estate, than that by the omission of a gift to executors it was intended to exclude personal estate.

Another argument is, that the individuals to whom the residuary gift is made, are also the executors. I do not think any intention can be collected from this.

Then comes the material point on which properly the counsel for the Crown principally relied. (The Vice-Chancellor referred to the trusts to collect, get in, &c.) Now there is no doubt these words are strictly applicable to outstanding or other personal estate; but in strictness also they are not applicable to certain portions of personal estate, which beyond all question would pass. If the testator had had leaseholds for years, or

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 MOSELEY.

even for lives, they would be personal estate ; and can I say that the use of words not properly applicable to real estate, is an indication of an intention that real estate should not pass, when the very same words are applied to personal estate of a certain character, which clearly was intended to pass ?

It is said that the leasehold estate would vest in the executors by force of law. But this is a *trust* to be carried into effect, by the executors, it is true, but not in their character of executors as such, but by them as trustees. They happen to be the same persons, but that does not alter their character. No doubt it would be the duty of the executors, if it were necessary for the purposes of the estate, to convert the leaseholds ; but so far as it would not be actually necessary for them to sell for such purposes, they ought not to sell. If the testator also made them trustees to hold the residuary estate on trusts, and those *trusts* require a sale, they must sell, but not in their character of executors, but of trustees.

But here there is more ; it is not left to the executors to carry out the trusts ; the bequest is of the residue after, if I may use the expression, the executors, as such, have done their worst ; that is, when they have sold all that it might be necessary to sell for the purposes of administration—what remains after that, is the subject of the residuary bequest to the trustees, which it is imperative on them to collect, get in, &c., and those words would include and apply as well to any leasehold remaining unsold by the executors, as to any other property.

Now it would be too hypercritical to consider whether

the words *get in and receive* might not be strained to apply to real estate. Those words, properly, strictly, honestly construed, certainly apply to personal estate, and not to land : they are not properly applicable either to real estate or to leasehold estate ; but still the use of them does not appear to me to indicate an intention in the testator to exclude from his bequest real estate, where they are clearly not intended to exclude personal estate consisting of leaseholds.

I think I have now dealt with all the objections made to the validity of this residuary bequest as passing real estate. And I do not think that, on any or all of them, I can conclude that in the will there is anything so inconsistent with the intention to devise real estate, as to give to the word *estate* a meaning different from its ordinary and legal meaning. I am of opinion, therefore, that the testator's real estate did pass by the residuary gift.

1853.
D'ALMAINE
v.
MOSELEY.

1853 :
1st July.

Tenant for Life.
Remainderman.

A testator devises real estate, subject to a lease for a term of years at 25*l.* 10*s.* rent, to *A.* for life, remainder to *B.* A railway Company purchases the interest of *A.* and *B.*, subject to the lease, for 1700*l.*, which is invested. The lease was granted at the said rent (less than a rack-rent) in consideration of a covenant to expend money, 600*l.*, on the estate during twenty years. Held, that the tenant for life was entitled to the whole of the dividends of the purchase-money.

RE STEWARD'S ESTATE, and THE 9 & 10 VICT.; THE LONDON AND BIRMINGHAM GRAND JUNCTION, and MANCHESTER AND BIRMINGHAM RAILWAY COMPANIES, &c. ;

EX PARTE JOHN BRISCOE and ELIZA CICELY his Wife, formerly ELIZA CICELY STEWARD, by her next Friend; and of HENRY BRISCOE and MARGARET his Wife, formerly MARGARET STEWARD, by her next Friend; and SAMUEL SYLVESTER MACAULY.

BURGESS STEWARD, the father of the two Petitioners, *E. C. Briscoe* and *M. Briscoe*, gave by his will certain freehold property upon trust, as to one moiety thereof, to each of his said daughters for life for her separate use, remainder to the children of his said daughters in the manner directed; and if one daughter should die without issue, remainder as to her moiety to her brother and the other daughter in fee; and if both daughters should die without issue, remainder to the said brother in fee. The testator died in 1832.

Part of the testator's freehold property consisted of a one-fourth share of a certain house, subject at the time of his death to a lease, of which forty-nine years were unexpired, at a rent of 25*l.* 10*s.* a year.

The *London* and North Western Railway Company contracted to buy the testator's share of the said house,

subject to the lessees' term and interest for 1700*l.*, which they deposited under an agreement, in a private bank, and for which they were to pay, from the time when they should take possession, 5*l.* per cent. interest till the money was paid into the bank in the name of the Accountant-General.

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In re
STEWARD'S
ESTATE.

The interest which thus accrued from the time when the Company took possession until April, 1853, was 319*l.* 4*s.* 8*d.*, in respect of which the Company paid to the two female Petitioners, as tenants for life, one-fourth of 94*l.* 19*s.* 4*d.*, which was the amount of the yearly rent of 25*l.* 10*s.*; and in April, 1853, the Company paid the 1700*l.* and the balance of the interest, 224*l.* 5*s.* 4*d.*, into Court.

The two Petitioners, the tenants for life, claimed to be entitled to the 224*l.* 5*s.* 4*d.*, and to have the 1700*l.* the purchase-money invested, and to be paid from time to time the dividends of the 1700*l.* The Petitioner *Meanley* was the representative of the testator's surviving trustee.

The parties entitled in remainder, on the other hand, contended that the tenants for life were only entitled during the lease, to their one-fourth of the rent reserved, and that the surplus interest must be accumulated during the lease for the parties who should be entitled at its termination.

Mr. *Speed*, for the Petitioners.

The Company have purchased the estate of the tenants for life and of the tenants in remainder, subject to the interest of the lessee, whose interest they have dealt with quite irrespectively of that which the testator has

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STEWARD'S
ESTATE.

devised; the price given represents and is substituted for the devised estate; consequently, the tenants for life are entitled to the whole income. The fact, that before the purchase by the Company, they received only their portion of the rent does not affect their claim; the rent was then the whole income; but they are entitled to the income whatever it may be. Suppose the lease had been forfeited, can it be contended that they would not have become immediately entitled to whatever was the income arising under any fresh lease? Here the effect of the purchase was to purchase up the interest of the remainder-men at 1700*l.*, subject to the life estate, and to purchase up the interest of the tenants for life in the rent, for the income to arise from 1700*l.*

Mr. Temple, contra.

The tenants for life were entitled during the lease to their share of the rent and no more; subject to that, the estate was in the remainder-men.

The purchase by the Company could not have the effect of increasing that which was given by the testator to the tenants for life. Suppose the lease had been at a peppercorn rent; during the lease, the tenants for life would have been entitled to nothing; the purchase-money would in that case be plainly the price of the reversion only, and it never could be contended that the tenant for life would have a right to take the interest of the purchase-money during the lease. The principle must be the same if an actual rent is reserved. The purchase-money is the price given for the reversion and the rent; and the tenants for life can therefore only be entitled to take the equivalent of the rent out of the income; everything beyond that, is what was paid, not for their estate, but for the estate in remainder. The

Court so deals with the purchase-money in cases of sales by ecclesiastical corporations: *Ex parte Dean and Chapter of Gloucester* (a).

1853.
In re
STEWART'S
ESTATE.

Mr. Speed, in reply.

If the rent reserved had been a peppercorn, the value of the interest of the tenants for life might be nothing, or it might be something; and its value would depend on the proportion between the life of the tenant for life, and the length of the term: but so would the value of the reversion; and if the length of the term were such as to leave any value at all in the reversion, the estate for life must also have some fraction of that value.

Suppose the lease had only a year to run, and the tenant for life was only twenty-one. Then of course the value of the property would be almost the same as if there were no lease: it would diminish in proportion to the length of the lease; but in no case could the life estate be valueless, except in the case of the lease being so long that no human life could by possibility see it out, in which case it is clear that the reversion would also be valueless. Whatever then be the price given by the Company, it is the purchase-money of the reversion, and of the value of the interest for life; the capital represents the former; the dividends represent the latter. It is said, that if the lease were at a peppercorn rent, the tenant for life could receive nothing during the lease; nor could the reversioner. The effect of the purchase is to change the position of both parties; it gives to the remainder-man the advantage of immediate possession, expectant on the death of the tenant for life, of a small sum, instead of possession of a larger estate, post-

(a) 15 Jurist, 239.

1853.

In re
STEWART'S
ESTATE.

poned in enjoyment to the termination of the lease ; and it gives to the tenant for life immediate possession of a small income, instead of the prospective possession of a larger one. That is the nature of the transaction ; and if the valuation is properly made (and it must be assumed that it is), each party, the tenant for life and the remainder-man, has, whatever be the rent reserved on the lease, the exact equivalent of his interest in the land, subject to the lease. How does this case differ from the common case of a sale under a power in a settlement of lands in lease ? Was it ever heard there that the tenant for life was only to have an amount equal to the rent ? This is a sale under parliamentary powers, and the same rule must apply.

The tenants for life and the remainder-men both take under the will, and the land was in lease at the date of the will, and at the death of the testator. What the testator devised by his will was, his estate and interest in the land, and his estate and interest in the land was the fee simple *subject to the lease* ; the fee simple subject to the lease, therefore, is what the Petitioners were entitled to for life, and that is what they have sold to the Company. How then can it be said that they are not entitled to receive for life the income of the price paid for the very thing which was devised to them for life ? The 1700*l.* represents the whole of the testator's estate and interest in the land, and it is the testator's estate and interest in the land, and not the rent reserved by the lease, which is devised to the Petitioners for life.

In that respect, therefore, this case is clearly distinguishable from the case of *The Dean and Chapter of Gloucester* ; but besides, in that case only part of the land demised was purchased by the Company ; and it may be

admitted that when a railway company purchases from an ecclesiastical corporation part of lands which are in lease, and separately agrees with the lessee to compensate him for his interest in such part, and the lessee continues to pay the entire rent reserved by the lease, the course of the Court is to direct the investment of the purchase-money and the accumulation of the dividends till the expiration of the lease, because in that case the thing sold is simply the reversion in part of the land demised, and the bishop or rector for the time being has no present right to such reversion, or to the income of its price.

1853.
In re
 STEWARD'S
 ESTATE.

The case stood over to ascertain what consideration had been given for the lease.

The Vice-Chancellor was informed on a subsequent day, that no money consideration had been given for it, but that it had been granted in consideration of a covenant by the lessee for repairing, and laying out 600*l.* in repairs within twenty years. He thought that was a covenant for the benefit as well of the tenant for life as of the remainder-man; and, under the circumstances, the tenants for life were held entitled to the interest of the 1700*l.*

1853:

7th July.

*Will.**Construction.
Charitable gift,
Cy près.*

A gift by will to a particular charitable institution, maintained voluntarily by private means. The particular institution had ceased. Held, that the gift was not to be disposed of as a charitable gift *cy près*, but failed, and fell into the residue.

CLARK v. TAYLOR.

THIS cause was heard on a motion for a decree. The only material question arose upon the will of *James Baylis*, the testator in the cause, which contained the following gift: "And I give to the treasurer for the time being of the Female Orphan School in *Greenwich* aforesaid, patronized by Mrs. *Enderby*, the sum of 50*l.* for the benefit of that charity." It appeared by the evidence, that Mrs. *Enderby* named in the will was a lady of fortune, who had been in the habit for many years previous to and after the year 1839, of spending her own money in the education and maintenance of several female children, sometimes in one house, sometimes in another, in *Greenwich*, which she rented at her own expense, sometimes at her own house. Mrs. *Enderby* for a portion of the period had a board put up in front of the house in which she carried on the education of the female children, with the words "Orphan Girls' School," or "Female Orphan School," or some such words, painted on it. There never was any trust, or deed of endowment, or any treasurer; the school being simply a school voluntarily kept up by Mrs. *Enderby* at her own expense.

Mrs. *Enderby* discontinued the school in November 1846; the children then being educated were sent away, and no such school afterwards continued. The testator's will was dated March 1839; he died in October 1840.

The question was, whether the bequest to this school

failed, and fell into the residue, or whether it was dedicated to charity, and was to be disposed of *cy près*.

1853.

CLARK

v.

TAYLOR.

Mr. *Bazalgette*, for the Plaintiff, cited *Cherry v. Mott (a)*.

Mr. *J. H. Palmer*, for a Defendant in the same interest.

Mr. *Busk*, for the Executors.

Mr. *Wickens*, for the Crown, cited *Loscombe v. Wintringham (b)*, and contended that wherever there is a charitable gift which fails, the gift being impressed with charity must be disposed of either by this Court, or by the Crown ; and this was clearly a charitable gift.

Mr. *Palmer*, in reply.

The principle is, can you collect an intention to give for charitable purposes *generally* ; the rule is not that wherever there is a charitable gift which *fails*, it goes to the Crown as charity ? *Loscombe v. Wintringham* was a case of a *public* charitable purpose. This is not a general charitable purpose, but a gift to a supposed private charity.

The VICE-CHANCELLOR (after stating the facts) :

I must take it upon the evidence, that, during the latter part of the existence of this school, at any rate, it was entirely Mrs. *Enderby's* private school. She may have had from time to time, from friends or otherwise, some trifling contributions in aid, but it appears to have been substantially maintained at her expense.

(a) 1 Myl. & Cr. 123.

(b) 13 Beav. 87.

1853.

CLARK

v.

TAYLOR.

The question is, whether the gift in this will is to be considered as a gift intended for charitable purposes generally, or whether it was simply intended for the benefit of a particular private charity. Now, there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases, it is difficult to see to which particular class the case is to be referred, and this is, to a certain extent, one of such cases.

The testator seems to have assumed that this school was conducted as charity schools usually are, by means of the usual machinery, with a treasurer or some other officer appointed, into whose hands he wished the money that he left, to be paid.

Did he intend the money to be paid to provide for the education of female children generally, or did he intend merely to provide for the education, exclusively, of such as were under the care of Mrs. *Enderby*? did he intend the 50*l.* to go to that particular institution? (His Honour referred to the words of the gift.) Now, these words do not appear to contemplate a charitable purpose generally, nor even generally the particular species of charity designated. A particular school appears to have

been intended. If no such school had existed, the testator could not have had the intention to benefit the particular school, and might have intended general charity; but here, upon the facts, the testator may have personally seen, and known, and approved this school. That could not have been the case in *Loscombe v. Wintringham*; there it was shown that no such institution as that referred to by the testator existed: he must have intended therefore some general purpose of charity. That distinguishes this case from *Loscombe v. Wintringham*, the authority of which I do not here in the slightest degree mean to impugn.

Now, there having been such a school as the testator describes, it being a mere private school maintained by the beneficence of Mrs. *Enderby*, I cannot say that the legacy given to it is to go to any other institution. The gift, therefore, has failed, and falls into the residue.

1853.

CLARK

v.

TAYLOR.

1853 :
25th July.

Will.
Trust.
Precatory
Words.

Testator by his will gave certain shares of freehold and leasehold houses to his wife, *for her sole use and benefit*, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same.

He gave her all his monies in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath *what should be remaining*, in such sums as she should think proper, unto such members of her own and his family that she should think most deserving, and were entitled to the same. He made a codicil by which he gave in terms, his residuary estate to his wife.

Held, that both as to the freehold and leasehold property and the monies, there was no trust ; but the wife took absolutely.

GREEN v. MARSDEN.

THE question in this case turned on the will of *Boyle Arthur*. By his will the testator gave to his wife "the five shares of the freehold and leasehold messuages or tenements in the City of *Bath* which belonged to him, and formed part of the property of his wife's father, deceased, to and for her sole use and benefit." The will proceeded thus : "And *I beg and request* that at her death she will give and bequeath the same in such shares as she shall think proper unto such members of her own family as she shall think most deserving of the same. I give and bequeath unto my beloved wife all my money in the funds, and all other money that I may be entitled to, and for her sole and separate use and benefit ; and *I beg and request*, that at her death she will give and bequeath what shall be remaining, in such sums as she shall think proper, unto such members of her own and my family that she shall think most deserving and entitled to the same, and I hereby appoint my beloved wife sole executrix."

The testator made a codicil, by which he bequeathed in terms his residue to his wife ; he died in August 1844, leaving his wife surviving : he left no issue. His widow

died in 1851, having by her will given the five shares in the houses at *Bath* and her residuary estate to Dr. *Marsden*.

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Mr. *Pigott*, for the Plaintiffs, the executors of Mrs. *Arthur*, submitted the case for the decision of the Court.

Mr. *Daniel* and Mr. *Bichner*, for Dr. *Marsden*, cited *Pushman v. Filliter* (a), *Wynne v. Hawkins* (b), *Cowman v. Harrison* (c), *Wright v. Atkins* (d), *Sprange v. Barnard* (e), *Harland v. Trigg* (f).

Mr. *Bacon* and Mr. *T. Stevens*, for some of the relations of the testatrix.

Mr. *Rogers*, for others of the relations of the testatrix, cited *Doe d. Atkinson v. Fawcett* (g).

Mr. *Follett* and Mr. *Elderton* appeared for other persons in the same interest.

The substance of the arguments for the next of kin, and those who claimed adversely to Mrs. *Arthur's* will, was as follows:—

The devise as to the five shares of the freehold and leasehold estates to Dr. *Marsden* is void; the testatrix had no absolute interest, but only a trust estate, after her own life interest; she did not devise according to the trusts, and therefore the estate goes to the persons amongst whom she might, according to the trusts,

(a) 3 Ves. 7.

(b) 1 Br. C. C. 179.

(c) 17 Jur. 313.

(d) Turn. & Russ. 143.

(e) 2 Br. C. C. 585.

(f) 1 Br. C. C. 142.

(g) 3 C. B. 274.

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have devised it; that is, to her next of kin, for that is the meaning here of the word "family" (a). The word "family" is a definite description of *some* objects known to the law (b).

On the second portion of the gift, as to the money, *Duhamel v. Ardovin* (c) was cited as to the meaning of the words "what shall be remaining." Part of the money, it was said, consisted of Long Annuities; and as to this, which was property of an exhaustible character, the widow was intended to enjoy it in specie; and so far as it was not exhausted, the power to appoint and the trust applied. The case of *Gregory v. Smith* (d) was also cited.

Mr. *Bates*, for the heir-at-law of Mrs. *Arthur*, who was also one of her next of kin, claimed the real estate, to the exclusion of any other of the members of her family.

Mr. *Elmsley* and Mr. *Money*, for other relatives of Mrs. *Arthur*, cited *Knight v. Knight* (e), *Barnes v. Patch* (f), *Woodcock v. Renneck* (g), *Constable v. Bull* (h), *Surman v. Surman* (i), *Gibbs v. Tate* (k), *Parsons v. Baker* (l).

They argued, that, except in the words of gift, there was no expression in any other part of the will showing

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|---|------------------------|
| (a) 1 Rop. Leg. 137 <i>et seq.</i> ; <i>Cruweys v. Coleman</i> , 9 Ves. 319. | (d) 9 Hare, 708. |
| (b) <i>Pierson v. Garnet</i> , 2 Br. C. C. 38, 226; <i>Malim v. Keighley</i> , 2 Ves. 333; <i>Wood v. Cox</i> , 2 Myl. & Cr. 684. | (e) 3 Beav. 148. |
| (c) 2 Ves. sen. 162. | (f) 8 Ves. 604. |
| | (g) 4 Beav. 191. |
| | (h) 3 De G. & Sm. 411. |
| | (i) 5 Mad. 123. |
| | (k) 8 Sim. 132. |
| | (l) 18 Ves. 476. |

an intention to leave the property to the wife for her own absolute use. The words "what shall be remaining" mean merely the testator's residue: they have no reference to antecedent consumption of property, *Upwell v. Halsey* (a), *Grant v. Lynam* (b).

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Mr. J. V. Prior, for the heir-at-law of the testator, who was also his next of kin, argued, as to the second gift, that the words "what shall remain" meant what shall remain after the widow's death, having used it during her life: it was like a gift to her for life, remainder over after her death. He cited on this point *Huskisson v. Bridge* (c).

On behalf of the heir, he argued that the words of gift did not pass the fee in the real estate. If the words do not carry the fee, they are uncertain as to the real estate: there is therefore no trust or power; and there being no fee in the widow, the remainder was undisposed of, and goes to the testator's heir-at-law.

The VICE-CHANCELLOR:

I am of opinion that by this will no trust is created at all, either as to the freehold and leasehold property, or as to the money. A great number of cases have been cited, which at first sight appear to bear upon the case; and if I thought that the decision I am about to pronounce conflicted with those cases, I should have taken time to consider them. But it appears to me, that if I were to decide that here there is a trust, I should be going much beyond the decided cases." As to the general principle there is no doubt, though on the policy of establishing such a principle I have great doubt. (His Honor re-

(a) 1 P. Will. 651.

(b) 4 Russ. 292.

(c) 15 Jur. 738.

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ferred to a passage quoted in *Knight v. Knight* (a), from a decision of *Richards*, C. B. (b), to show that the cases have gone quite far enough.) To every word of this I entirely subscribe, and, regretting that the principle was ever established, I shall certainly not extend it one step further than it has already gone. Now, in *Knight v. Knight*, Lord *Langdale* observed on the principle to be deduced from the cases. (His Honor referred to the judgment.) To that exposition of the principle I subscribe, but I will not go beyond it. Applying that principle to this case, there are here distinct gifts to the widow of distinct parts of the testator's property, each accompanied by words in terms precatory; in each the precatory words are the same. Now, although the Court might hold words to create a trust as to a portion of a will, without of necessity holding that the same words would create a trust as to another portion, yet the intention as to one portion may be considered and collected by reference to the apparent intention in another. The second clause of this will is the one least open to doubt, and I shall for that reason consider it first. Now the words used, though they do not clearly amount to, might constitute a residuary bequest. The testator may have supposed that they would pass all his personal property; and I am not sure that, if there were no other words, they would not be sufficient. But the testator, either because he may have himself considered it doubtful whether the words were sufficient to pass his residue, or because he did not intend it to pass, has by his codicil, made only a few days after his will, expressly made a general residuary bequest. The testator therefore has, by the effect of his will and codicil taken together, shown that he did not mean the gift of monies to be a residuary

(a) 3 Beav. 148.

(b) See 3 Beav. 165.

gift; but he meant by it a specific bequest of a specific portion, and he gives that to his wife for her sole and separate use and benefit. He gives it for her sole use: that does not mean her separate use in the technical sense, but it means that she should have the absolute control and enjoyment; that the property shall be for the benefit of her, and of no other person than her. Now it is to be observed, that the testator in his residuary bequest gives his estate generally to his wife without precatory words, while in the bequest of the specific portion he uses the words referring to what shall be *remaining at his death*. What does that mean! What he means is this: the widow is to have it for her sole use and benefit, that she may do as she pleases with it—that she may spend it, or give it away, or bequeath it; but he expresses his wish, not imperatively, but desiring that she may know his wish, as to what she should do with what remains.

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Now, after the cases that have been decided, I could not say, that if the subject of gift were certain, and there was nothing to show that the language was merely precatory, there would not be enough to create a trust; but in order to see whether that is so or not, the words used may be considered with reference to other expressions in the will; and it is therefore proper to advert to the terms in which the objects of gift are expressed.

Now, it is said that the word “family” is a word that has received a certain interpretation, and so it has, but still it is in itself a word of most loose and flexible description; it may mean the heir-at-law, though that is not its natural meaning; it may mean the next of kin, and either living at the death of the testator, or living at the death of some other person: but here the testa-

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tor does not use simply the term "family," but speaks of such members of her own and his family as his wife may think fit.

Looking at the whole context, I think the case comes within the language of Lord Langdale's judgment in *Knight v. Knight*:—"If the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative; or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the object of the wish or request; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created" (a); and that in the second clause, the testator had no idea or intention of creating a trust, but intended his wife to have the property for her own use absolutely.

In the first clause there is more difficulty in the language. It is stated that the testator was himself owner of four tenth shares of the freehold premises in *Bath*, and of four tenth shares of the leasehold houses in *Bath*, which he had purchased from the father of his wife; one tenth belonged to his wife. As to the whole he uses this language, "I give," &c. (His Honor referred to the first clause of the will.)

Treating all the five shares as his, he gives them to his wife for her *sole use*; she alone is the object of his bounty; she is alone to have the enjoyment; and then come the precatory words, "I beg and request," &c., the same words as in the other precatory clause, with this distinction only, that the words "which shall be remain-

(a) 1 Beav. 173.

ing," which render the other subject of gift uncertain, are not in this clause; here the subject is certain; but when I find that in all other respects the two clauses are the same, it justifies the conclusion, that the clause falls within the same category as the other, and is within the definition expressed by Lord Langdale of the cases in which a trust is not created.

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The only remaining question is, whether the gift to the widow of the five shares is a gift for more than her life. It is said that it is only a gift for life. Now here the testator gives the five shares, &c., "which belonged to me." To what antecedent do these words refer? Not to the words "freehold and leasehold tenements" in the city of *Bath*; they did not belong to the testator. What he had was not the houses, but five shares in them. The words "which belonged to me" refer therefore to the shares, not to the houses. Then "the shares which belonged to me" are the same as "my shares;" and it has been determined that the latter words pass a fee. The word "shares" means all the estate and interest of the testator.

Besides, the very terms of the precatory clause import that the widow is to *devise*, which she could not do if she had not a fee in the whole. I think there was a devise of the fee to the widow; that there is no trust created; and, consequently, that the will of Mrs. *Arthur* took effect.

1853:
26th and 28th
May, and 3rd
August.

Appointment.
Revocation.
Powers,
Exhaustion of.

The facts of this case and the principal question were the same as in *Evans v. Saunders*, ante, p. 415; and on a re-hearing the judgment was affirmed.

General propositions concerning the nature, exercise, and exhaustion of a general power to appoint by deed or will, and concerning powers of revocation and new appointment.

EVANS v. EVANS.

EVANS v. SAUNDERS.

THE first of these causes was a creditor's suit affecting the estate of Mrs. *Evans*; and the material question involved was the same as that which had been previously argued and decided in the special case of *Evans v. Saunders* (a). But the Plaintiff in the suit not having been made a party to the special case, and insisting on having the point again argued, it was arranged that the parties to the special case should again appear on this occasion, and that the hearing should be treated both as a hearing of *Evans v. Evans*, and a re-hearing of *Evans v. Saunders*. The facts and the different documents are stated fully in the report of *Evans v. Saunders*.

The *Solicitor-General*, Mr. C. P. Cooper, and Mr. Tripp, for the Plaintiff, contended that the will of Mrs. *Evans* operated as an execution of her power. They stated the different transactions set forth in the report of *Evans v. Saunders*, and proceeded to argue as follows.

The *Solicitor-General*.

All the attempted exercises of the original power are destroyed, as if they had never been attempted or intended. The power of disposition by testamentary act, reserved to Mrs. *Evans*, remained unaffected, undisturbed by what had been done.

(a) *Ante* p. 415.

The authorities that were cited in *Evans v. Saunders* against the exercise of the testamentary power, are all cases relating to a single power. This is not a single, but a double power. If there is a power in a deed to appoint by deed, and in the same deed a power to appoint by will, these are different powers.

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Then, if I have exercised a power or authority given to me, and reserved authority to undo what I have done, and to exercise the authority anew, that which is reserved by the right of exercising the authority anew, is no more than the old power, which the very language of the reservation purports shall revive and be restored. The power reserved is a power to declare a use; why should that be considered a new authority? All that is required by the party exercising the power is, that there shall be a reservation to him of a power of annulling his existing intention, and of being restored to his original position as donee of the old power.

Now the judgment in *Evans v. Saunders* involves this proposition, which I submit is erroneous, viz. that the original power was a single power, and not two distinct powers. I contend that there are two distinct powers; and that the power to appoint by will was not affected by the exercise of the power to appoint by deed, that exercise being afterwards annulled.

This was the view taken by Mr. *Preston* (in his treatise on Abstracts). (The learned counsel also referred to 1 *Sug. Pow.* 6th edit. p. 470; 2 *Rolle's Abridgment*, 262.)

Hele v. Bond (a) is in accordance with the note in

(a) 2 *Sug. Pow. App* 575.

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28th May.

Rolle, and shows that the last appointment arises out of the original power. (He referred also to *Montague v. Kater* (a).)

Mr. C. P. Cooper and Mr. Tripp, with the *Solicitor-General*.

Assuming, for the purpose of the argument, that we are wrong in saying that the original power here was a double power, still *Montague v. Kater* contains dicta bearing on this case, and from which it must be collected that the original power was revived. (The learned counsel referred to the passages commented upon in the judgment. They referred also to *Chance on Powers*, vol. 1, p. 490.)

Secondly, this is a creditor's suit, to have the debts of *A. Evans* paid out of the price of her estate, which she has devised on trusts for sale; and, admitting the power not to have been well exercised by will, the Court will aid the defective execution in favour of creditors (b).

Mr. *Malins* and Mr. *Pitman*, for the trustees of Mrs. *Evans*' will, in the same interest.

Without discussing whether the original power was a double or a single power, at any rate Mrs. *Evans* had an absolute power, and she exercised it from time to time. The question is, did she *intend* to do anything more by the successive transactions than to undo what she had previously done? She need not have reserved anything but a power of revocation; the reservation of a power of new appointment was unnecessary: such a power would arise of itself. Therefore her reserving to herself a power of new appointment by deed does not

(a) 20 Law Times, 323, & 22 Law Journ. (N. S.), Exch. 154.
(b) 2 Sug. Pow., 6th edit. 135; *Tollet v. Tollet*, 2 P. Will. 490.

deprive her of her power to appoint by will. *Montague v. Kater* is inconsistent with *Evans v. Saunders*.

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Mr. *Daniell*, for *Thomas Jones Saunders*, the remainder-man.

The original power is clearly a single power. (He referred to 1 *Sug. Pow.* 271.) It is equally clear that a power to revoke and a power to create new uses are two distinct powers.—As to the argument that the reservation of a power of new appointment is redundant, he referred to 1 *Chance*, 111, to show that a power of revocation does not always involve a power of new appointment.

In this case the original power contains a power of revocation, but no power of new appointment is expressly reserved. But whether a new power of appointment is implied or not by a power of revocation, it clearly *may* be reserved; and if it is, it is then clearly the only power. (He referred to 1 *Sug. Pow.* 467; *Brudenell v. Elwes* (a).)

With him, Mr. *Greene*.

He referred to the *Countess of Roscommon's case* (b).

When the new set of powers and limitations created under the original power was introduced into the original settlement, it wholly displaced the original settlement; nothing of the old power remained. It is said the deed of 1836 revoked the power to appoint by deed, contained in the deed of 1835; but there is no indication of any such intention in the deed of 1835. The power to revoke applied to what went before it; the revocation

(a) 1 East, 442.

(b) 6 Br. P. C. Ed. Toml. 158.

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by the deed of 1886, therefore, only applied to the limitations preceding the power of appointing by deed.

As to *Montague v. Kater*; there, there was a special power to appoint to children, given to the father and mother, and in default of appointment a clearly distinct power. All that was done in that case was under the joint power; the new power had never been exercised.

Mr. *Bevir*, for the purchaser, took no part in the argument.

The *Solicitor-General*, in reply.

The proposition on the other side is that a power is discharged the moment it is exercised, although the instrument exercising the power, contains a power to revoke such exercise, and although that power of revocation is actually exercised.

An instrument made in exercise of a power is to be construed according to the intention of the party. If the instrument first made in exercise of a power of appointment is accompanied by a power to revoke, even although it also reserves a new power of appointment, yet if that particular deed is revoked, the effect is to take it out of the way altogether, as not at all expressing the intention of the maker of the deed. And if the power of revoking, being exercised, prevents the instrument having any operation, how can the instrument so annulled by the exercise of the power of revocation, have the effect of discharging the original power of appointment? The question is, can it be said that by the instrument which has been absolutely annulled, the original power has been executed and is at an end? Has any estate been created under that power? None. If an

estate is given subject to a condition, but the interest arising under that condition is determinable on another condition, then if the second condition occurs, the estate is remitted to its original ownership. Here is an estate made with a condition that the party creating it may revoke it, and that right to revoke is exercised, and the thing intended to have been done is annulled; the estate is then left to go in the original channel.

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The argument on the other side would go the length of annulling the terms of the original contract. The power was a power appendant, intended, if exercised, to be exercised at the pleasure of the donee, with a power of annulling what he might do.

The several deeds here are all emanations from the original authority, and when obliterated, the Plaintiff is reinstated in his former ownership.

Hele v. Bond is only an authority for this, that if there is a power of appointment with a power of revocation, and the power of appointment is exercised, without reserving a power of revocation, the instrument takes effect, and the original power of revocation cannot be resorted to; that was the ground on which *Hele v. Bond* was decided. The Court did not say in that case, that if a power of revocation had been reserved, it would have been a new power, but spoke of it as a reservation of the old power of revocation; so here, the reservation of a power of revocation is not a reservation of a new power, but a preservation of the old power.

The learned counsel commented on *Montague v. Kater*, and contended that in this case, the last deed being only a revocation, the original power was restored.

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The Vice-Chancellor took time to consider, and on the 3rd of August delivered the following judgment:—

This matter comes before the Court on the re-hearing of a special case, and also on the hearing of a cause of *Evans v. Evans* on further directions, and a petition, the question to be determined in the cause, being the same as that raised by the special case. When the special case was first heard, and decided by me in February last, I was not informed (as I ought to have been) that the question upon which it sought the opinion of the Court was the subject of a reference to the Master in the cause, and that the Master had actually reported upon it. Had I been aware of that, I should have declined to hear the special case until the cause should come on for further directions. All parties, however, have very properly agreed that the special case should come on to be reheard with the hearing for further directions, and that the question at issue should be open upon both, and should now be determined both on the one and the other, all parties agreeing to be bound by the decision of the Court.

The question I am called upon to decide is, whether the will of Mrs. *Ann Evans*, dated 3rd March 1848, operated as an effectual appointment of certain freehold estates in *Wales*; and this question depends upon another, viz. whether at the date of the will and the death of the testatrix, she had any subsisting power to appoint these estates by will. If she had, it is not disputed that the will operated as an effectual exercise of the power.

The facts of the case are as follow. (The Vice-Chancellor stated the facts set out in the special case, *ante*, p. 415.)

The principal argument of the learned counsel who support the will is in substance this: they contend that, by the original settlement of 1794, Mrs. *Evans* had two distinct powers, one a power to appoint by deed, and, in default of appointment by deed, another distinct power to appoint by will; that, having these two separate and distinct powers, she did, by the deed of appointment of 1830, exercise the former power, that is, the power to appoint by deed; but left the latter, that is, the power to appoint by will, still subsisting; that this power to appoint by will continued to subsist, unaffected by the deeds of revocation and new appointment of 1833 and 1835; and that the deed of 1836 having simply revoked the uses appointed by the deed of 1835, without appointing any new uses, the power to appoint by will created by the original settlement of 1794, which had survived the operation of all the several appointments by deed, remained in full force and capable of being exercised, and was duly exercised by the will of 1848.

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This argument is based exclusively upon this proposition: that a power to appoint by deed or will is not a single power, but two separate and distinct powers. That proposition is the sole foundation for the whole of this argument in support of the will; and unless that proposition can be maintained, the whole argument fails.

After a second careful consideration of the case, and examination of all the authorities I can find on the subject, I am compelled to declare my entire dissent from that proposition. I will state the reasons for which I have arrived at this conclusion.

In the first place, I may observe that no sort of authority, not even a dictum in any case ancient or modern,

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or in any text-book, has been (or, as far as I am aware, can be) cited in support of the proposition. It is true there is an equal absence of authority the other way; but I believe the fact is, that the point has never before been suggested. The idea does not seem to have occurred to the mind of Lord *St. Leonards*, or Mr. *Powell*, or Mr. *Chance*, or any other text writer whose works I have had an opportunity of consulting. And I confess that when it was mentioned on the former argument of the special case, I was struck by its novelty. But it does not therefore follow that it is unworthy of attention, and I proceed to consider it minutely.

The proposition involves, indeed must be founded upon, this principle, that every separate species or form of instrument by which the donee of a power is authorized to exercise it, constitutes a separate and distinct power. Consider the consequences of such a principle. Suppose the settlor reserves a power to appoint by deed, or will, or other writing, the principle now under consideration would require me to hold that in such case the donee had not one power of appointment, but three powers: one to appoint by deed, and, in default, &c., another distinct power to appoint by will; and, in default, &c., a third distinct power to appoint by mere writing, not being either deed or will. So, again, if a power of appointment were reserved without specifying any particular instrument, it would equally follow that the donee had three distinct powers of appointment, because it is well established that such a power may be exercised either by deed, or by will, or by a mere writing signed by the donee, being neither deed nor will. Suppose again a power to appoint by deed attested by *A.* and *B.*, or the survivor of them; here the donee must be held, according to this principle, to have two distinct powers,

one to appoint by deed attested by *A.* and *B.*, and, in default, &c., another distinct power to appoint by deed attested by the survivor of them. So, again, a power to appoint by deed attested by *A.*, or *B.*, or *C.*, must be three distinct powers, and not a single power. And upon the same principle, in the case of the power which gave rise to the case of *Harris v. Bessie (a)*, which was a power to a woman to make a will in the presence of her husband, or of *J. S.*, or of such two persons as she should appoint, the lady must have had three separate and distinct powers to make a will. Indeed, if the question of the unity or plurality of the power is to depend upon the number of different kinds or forms of instrument by which the donee is authorized to exercise it, I do not see how you could stop short of saying that a general power of appointment not specifying at all the sort of instrument by which it must be exercised, is I know not what number of distinct powers, seeing that it may be exercised by will, or by mere writing, or by deed unattested, or by deed attested by one witness, or by deed attested by two witnesses, and so on in *infinitum*.

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These consequences, which necessarily follow from the principle or supposed principle I am now considering (and a great many others might readily be suggested), are, to say the least, somewhat startling; and their very novelty and strangeness would seem to suggest that there can be no soundness in the principle which would produce them.

But I think that the fallacy of the proposition is made most apparent by considering that the specifying any particular instrument by which a power is to be exercised, so far from being the creation of a power, is in

(a) 1 Keble, 348.

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truth nothing else but a restriction on the power. If a power of appointment is given, and nothing is said as to the instrument by which it is to be executed, the power may be exercised (as I have before observed) by any instrument whatever, even by a mere writing which is not of a nature to *convey* lands: there is no restriction whatever on the exercise of the power. But if the donor of the power specifies any particular kind or form of instrument by which the appointment must be made, that specification of the instrument operates merely as a restriction imposed upon the exercise of the power. If the donor of the power requires it to be exercised by deed or will, he restricts it to a certain extent, that is, he excludes its being exercised by a mere writing which is neither a deed nor a will. If he requires it to be exercised by deed only, he restricts it still more, that is, he excludes its being exercised by will, or by writing not being a deed. If he requires it to be exercised by a deed attested by two witnesses, he restricts it again still further, that is, he excludes its being exercised by will, or by writing not being a deed, or by a deed attested by only one witness, or not attested at all. And in like manner the donor may impose still further restrictions, as by naming the particular individuals by whom the deed exercising the power must be attested, or by requiring that it should be exercised with the consent of A. But the specification by the donor of the particular kind or form of instrument by which the power must be exercised only operates to impose a greater or less degree of restriction on the exercise of the power, and such greater or less degree of restriction on its exercise cannot alter or affect the unity of the power. The power is single, whether the donee of the power be restricted to one particular kind or form of instrument in exercising it, or is allowed to choose between two specified kinds

or forms of instrument by which he may exercise it, or is altogether unrestricted in its exercise. The language of Lord *St. Leonards* is this: "Where several modes of executing a power are stated, the donee may, in the absence of a direction to the contrary, execute it in which of the ways he pleases;" and he proceeds to illustrate this by the instance of the power I have before mentioned as occurring in *Harris v. Bessie*. This language could hardly have been used by one who had the least notion that the option to the donee of exercising the power in which of two or more different ways he pleased, conferred on him two or more distinct powers.

I conclude, therefore, that a power to appoint by deed or will does not constitute two distinct powers, but is a single power, with this restriction on its exercise, viz. that it must be exercised by deed or by will, leaving to the donee the option of choosing, within the limits of that restriction, which of these two kinds of instrument he will use in exercising it, and that there is no foundation for the proposition insisted upon by the Defendant's counsel. And as that proposition is the foundation of the whole of the argument, I cannot assent to the conclusions attempted to be deduced from it.

In considering the effect of the several deeds executed by Mrs. *Evans*, it is necessary to keep in mind that the original power of appointment given to her by the settlement of 1794 was a *general* power, by the exercise of which she might appoint and dispose of the fee to any persons or in any manner she might think fit, even to herself. And this kind of power is often said, in the text-books, and in the dicta of judges, to be equivalent or tantamount to the ownership of the fee. And this designation of it, though not strictly true in every

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respect, is true in this sense (and it is in this sense that the expression is intended)—that it enables the donee, provided he keeps within the restrictions imposed on its exercise, to dispose of the fee as completely and effectually, according to his own uncontrolled discretion, as he could do if he were the actual owner of the fee; and it enables him, if he is so minded, to acquire the fee himself. He may impose any terms or conditions, or reserve any powers he pleases, just as an owner might do. In this respect it differs widely from a special power, which is to be exercised only in favour of particular objects and for special purposes, such as a power in a marriage settlement to appoint among children, or a power to jointure a wife. And although some of the rules respecting powers are equally applicable to both a general power and a special power, yet it is obvious that the one kind of power may be subject to and governed by principles and rules which would not necessarily be applicable to the other.

At the time, then, when *Mrs. Evans* was about to execute the deed of 1830, this was her position with respect to the lands in question: all the estates limited by the settlement of 1794, preceding the power of appointment, had ceased and determined, except her own life estate. She was then tenant for life, with a general power of appointment over the fee in remainder or reversion expectant on that life estate, which power, however, she could only exercise by deed attested by two witnesses, or by will attested by three witnesses; in default of appointment, the lands were limited to certain uses amounting to the fee.

What, then, was the effect of the deed of 1830? Having the right of choice between the two modes prescribed

for the exercise of her power, she chose to do it by deed ; and by this deed she fully and completely exercised it, by appointing and declaring uses amounting to the fee, to take effect after the determination of her own life estate ; but she reserved to herself a power by deed, attested by two witnesses, to revoke those uses, and a power by the same, or by any other deed similarly attested, to appoint other uses. Now, it appears to me unnecessary, with a view to the decision of this case, to enter upon a minute discussion of the question, what would have been the effect if *Mrs. Evans* had reserved *only* a power of revocation, without reserving any power of new appointment, and had afterwards exercised such power of revocation. That is a question upon which learned and eminent writers have entertained different opinions. The difficulties which present themselves upon that question do not exist in the case now before me, because, by the deed of 1830, *Mrs. Evans* reserved to herself, besides the power of revocation, a new power of appointment. It was perfectly competent to her to reserve what powers she pleased, and to be exercised in any form she pleased to prescribe. She might have reserved a power of appointment without any restriction at all on its exercise, or with any greater or less degree of restriction on its exercise. She might have reserved a power of appointment to be exercised by any instrument whatever, or to be exercised only by deed or will, or to be exercised by deed only or by will only, by deed attested by any prescribed number of witnesses, or without any specification respecting its attestation. But, whatever greater or less degree of restriction she chose to impose upon her exercise of the power of appointment reserved by the deed of 1830, it was still a *new power*, newly created by this deed of 1830, and was not the original power created by the settlement of 1794. It would not have been the less a

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new power even if she had thought fit to impose precisely the same degree of restriction on its exercise as had been imposed on the exercise of the original power created by the settlement of 1794; that is, if she had reserved it to be exercised at her option by deed attested by two witnesses, or by will attested by three witnesses. She thought fit, however, to impose upon the exercise of this newly-created power of appointment reserved by the deed of 1830, a greater degree of restriction than that which had been imposed on the old power in the settlement of 1794; for whereas the old power was capable of being exercised either by deed or will at her option, she made the new power exercisable by deed only. In another respect also, she thought fit to create by the deed of 1830 a different form of power from the old power contained in the settlement of 1794; for the old power was what Lord *St. Leonards* calls a *primary* power; that is, a power of appointment preceding the uses declared by the instrument creating the power, which uses are to take effect in default of appointment; so that the exercise of such a power operates, not to *revoke* the uses declared, but to *supersede* them; and Mrs. *Evans* might, if she pleased, have created by the deed of 1830 a similar *primary* power, by appointing to such uses as she should thereafter by deed appoint, and in default of such appointment, to the uses declared by the deed of 1830; but she thought fit by the deed of 1830 to create a different form of power, by first declaring uses and then reserving a power to revoke those uses, and a power to appoint new uses. In every point of view, and in every sense, the power of appointment created by the deed of 1830 was a *new* power, and not the old power contained in the settlement of 1794.

And not only was this a new power of appointment,

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but so long as it subsisted, the old power of appointment had no existence. In exercising the old power, she had appointed and declared uses amounting to the fee, so as completely to exhaust the power; and if she had reserved no new powers of revocation and new appointment, it is obvious that the old power could never again exist. But she reserved powers of revocation and new appointment; and whatever might have been the effect if she had reserved *only* a power of revocation without reserving any power of appointment, and even supposing that in that case the exercise of such power of revocation would have had the effect of restoring the old power of appointment (though that may be questionable), still it appears to me clear that the express reservation of the new power of appointment must have the effect of preventing the restoration of the old power. So long as the powers of revocation and new appointment reserved by the deed of 1830 remained unexercised, there cannot, I conceive, be a doubt that Mrs. *Evans* could not have made an appointment by virtue of the old power; she no longer retained the old power, it had been fully exercised. Having then only the powers of revocation and new appointment reserved by the deed of 1830, and it being competent to her by the very terms of the reservation to exercise those two powers either at the same moment and by the same deed, or at different times and by different deeds; if she had thought fit to exercise first the power of revocation, that would not have destroyed or affected the new power of appointment; on the contrary, that power would have still continued in full operation, and capable of being exercised whenever she chose. And I cannot comprehend how the old power of appointment should in that case have been revived so as to co-exist with the new power of appointment. To test this point, let us suppose that the old

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power had been a power to appoint only by deed attested by two witnesses, and that in exercising that power by the deed of 1830, she had reserved power to revoke by a deed attested by three witnesses, and by the same deed or any other deed similarly attested to appoint new uses, and she had first exercised the power of revocation only. would that have had the effect of restoring the old power so that she would then have two powers of appointment, one the new power to appoint by deed attested by three witnesses, and the other the old power to appoint by deed attested by two witnesses? Suppose again that the old power had been a power to appoint by deed, and that in exercising that power by the deed of 1830, she had reserved a power by deed, *with the consent of A.*, to revoke the uses, and by the same or any other deed, *with the like consent of A.*, to appoint new uses, and she had first exercised the power of revocation only, by deed made with *A.*'s consent, the new power of appointing with *A.*'s consent would clearly remain capable of being subsequently exercised: could it then be contended that the old power would be restored, so that, besides the new power to appoint by deed with the consent of *A.*, she had at the same time a co-existing power to appoint by deed *without* the consent of *A.*? Surely the reservation, in the deed of 1830, of the new power of appointment in connection with the power of revocation, amounts to a declaration that if she should exercise the power of revocation, she should retain only the new power of appointment which she had created for herself, and that she should be enabled to make a new appointment only by means of such instrument, and to be executed with such forms and circumstances as she had thought fit to prescribe by way of restriction on the power which she had thus created for herself. Indeed, the learned counsel in support of the

will did not venture to carry their argument so far as to contend that the old power would have been continued or restored so far as it was a power to appoint *by deed*; but, feeling the impossibility of maintaining that the old power was altogether restored, they resorted to the suggestion which I have already noticed, that there were two distinct powers in the settlement of 1794, the one a power to appoint by deed, and the other a power to appoint by will, and that it was the latter power which continued to subsist and remained capable of being exercised, notwithstanding the reservation of the new power of appointment; so that the very argument advanced in support of the will involves a tacit admission that, unless the proposition can be maintained that a power to appoint by deed or will constitutes two separate and distinct powers, the reservation of the new power of appointment prevented the continuance or restoration of the old power.

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And here I must advert to the case of *Montague v. Kater (a)*, which was cited in the course of the argument. I may observe that the power in that case was a *special*, and not a *general* power; but let me suppose, in favour of those who support the validity of Mrs. *Evans'* will, that it stands on the same footing as a general power. In that case, by a marriage settlement, lands were settled to the use of the husband and wife successively for life, with remainder to the use of all or any one or more of the children of the marriage, in such shares, and for such estates, and in such manner as the husband and wife should jointly by deed, with or without power of revocation and new appointment, appoint; and in default of such joint appointment, then as the survivor

(a) 22 L. J. (N. S.), Exch. 154; and 20 Law Times, 323.

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of them should by deed or will appoint; and in default of appointment, then to certain uses under which the eldest son of the marriage would have become entitled. There were two children of the marriage, *Henry* and *Edward*. The husband and wife, by deed dated in October 1832, jointly appointed, subject to their own life estates, to *Edward* the youngest, in fee, and by that deed they reserved a power of *joint* revocation and a power of *joint* appointment among the children by deed. By a subsequent deed, they exercised the joint power of revocation without making any new appointment. The wife afterwards died, and then the husband, as the survivor, by his will appointed to *Edward* the younger son, in fee. The question was, whether this appointment by the survivor was valid, which of course depended on the question whether the power of appointment reserved by the original settlement to *the survivor of the husband and wife* was subsisting and capable of being exercised. The Court of Exchequer determined, after much consideration, that it was, and in the propriety of that decision I entirely concur. I cannot, however, concur in some of the observations which fell from the learned Baron who delivered the judgment of the Court. He expressed an opinion that the effect of the joint revocation was to restore the settlement entirely, including the joint power of appointment contained in that settlement. He does not say what had become of the new joint power of appointment reserved by the deed of October 1832. There is not the least allusion to it. It is not suggested (nor could it be) that this power was destroyed or lost; so that if the old joint power of appointment was restored, the husband and wife must have had two distinct co-existing joint powers of appointment, one the old power under the settlement, and the other the new power under the deed of October 1832, and both powers to be exer-

cised by the same kind of instrument, and with the same formalities, and in favour of the same objects.

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Now it is to be observed that the whole judgment professes to be founded on what is laid down in 1 *Sugd. Pow.* 459, (which corresponds with p. 481 of the 6th edition,) and the subsequent pages. The language of the learned Baron is this: "We think that in so doing," (that is, by the husband and wife simply revoking their joint appointment), "they restored the original settlement entirely, and we find it thus stated by Lord *St. Leonards* in his Treatise on Powers, vol. 1, p. 459, *citing as his authority, with approbation*, Mr. *Preston's* very learned book on Abstracts, p. 277, that 'when a man has a power of appointment, and he exercises that power with the addition of a power of revocation, this power of revocation is annexed to the uses introduced into the appointment, and by revoking the uses contained in the deed of appointment, there will be a revival of the original uses, and amongst them of the power of appointment. The effect of revocation will be to revive the original power, so that it may be exercised again and again.'" (That is the quotation made by Lord *St. Leonards* from *Preston* on Abstracts.) The judgment then proceeds thus: "Lord *St. Leonards* afterwards states, (and we cannot do better than quote his very words,) If the original power be a general primary one," and so on, setting out the passage which follows in the text of Lord *St. Leonards's* book. Now, with all deference to the learned Baron, he has, in the first place, fallen into a misapprehension in supposing that Lord *St. Leonards* cites the passage from Mr. *Preston's* book "*as his authority*," or "*with approbation*;" for a close examination of what precedes and follows that citation will show beyond a doubt that Lord *St. Leonards* cites

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Mr. *Preston's* proposition for the purpose of pointing out that though that proposition is true as regards a power of revocation reserved in a deed exercising a *primary general* power of appointment, it is wholly unfounded as regards a power of revocation reserved in a deed exercising a power of revocation. But (what is of much more importance) the learned Baron has altogether overlooked this, that not only the proposition quoted from Mr. *Preston's* book, but the whole of Lord *St. Leonards'* reasoning and observations upon this subject, are in the most express and distinct terms confined to the case where the donee of a power, exercising that power, reserves *only* a power of revocation, *without reserving any new power of appointment*. Lord *St. Leonards* having in the previous pages discussed *Ward v. Lenthal*, in which it was resolved that where the donee of a power of revocation and new appointment exercises those powers, reserving only a power of revocation, and afterwards exercises such power of revocation, he cannot limit new uses, his Lordship proceeds thus, (and be it observed, that this is the commencement of the very passage on the authority of which the learned Baron founds his judgment): "There appears to be no authority to oppose to the resolution in *Ward v. Lenthal* and the decision there referred to; and the principle upon which the decisions have proceeded is not opposed to that resolution. It should be borne in mind that the question can arise only upon an appointment under a power *with the reservation of a power of revocation only*. What, then, is the effect of a revocation by force of the power so reserved?" He then states Mr. *Preston's* opinion, citing from his book on Abstracts two propositions, the one being that a power to revoke will not authorize a new appointment, and the other being the proposition referred to by the learned Baron, and which

he erroneously supposes to have been cited by Lord *St. Leonards* "as his authority and with approbation."

Lord *St. Leonards* then proceeds to deal with each of those two propositions of Mr. *Preston* in succession.

With respect to the first, he says, "Now we have seen that a power to revoke in an original instrument *does* authorize a new appointment." And with respect to the second he proceeds to show, that though true as applied to a power of revocation reserved in a deed exercising a primary power, it is not true as applied to a power of revocation reserved in a deed exercising a power of revocation. But he again and again carefully and in the most explicit terms states that he is only dealing with the case in which a power of revocation *only* is reserved, without reserving any power of new appointment.

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In fact, the proposition that where a donee exercising his general power of appointment reserves a power of revocation and also a power of new appointment, the exercise of the power of revocation will have the effect of restoring his original power, does not receive countenance from a single line throughout Lord *St. Leonards'* work; on the contrary, I think it is impossible to study carefully the part of that work which has been referred to, and the cases which are there discussed, without coming to the conclusion that the noble and learned author would be of a directly contrary opinion.

I have ventured thus frankly, but with all deference, to state my opinion that the grounds for the decision in *Montague v. Kater*, as stated in the judgment, are untenable, and that there is no foundation for the assumption that the exercise of the joint power of revocation had the effect of restoring the *old* joint power of ap-

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pointment when the parties had expressly reserved to themselves a *new* joint power of appointment.

In truth it was altogether unnecessary to resort to this assumption in order to arrive at the decision in *Montague v. Kater*. The question in controversy was not whether the old joint power created by the original settlement was restored or subsisting, but whether the *other* power of appointment given by that settlement to the *survivor* of the husband and wife was restored or subsisting. And for the decision of that question it was immaterial whether the old *joint* power was subsisting or not. The decision that the separate power to the survivor was subsisting after the exercise of the power of revocation was perfectly right, but, as it appears to me, for very different reasons.

The joint power of appointment given by the settlement to the husband and wife, and the separate power to the survivor, were two several and distinct powers. They were given to different donees, and they were as completely two distinct powers as a power of appointment to *A.*, and in default, &c., a power of appointment to *B.* would be two distinct powers. Now, if lands are settled to such uses as *A.* shall by deed appoint, and in default, &c., to certain specified uses, and *A.* exercises his power by deed, and thereby reserves to himself *only* a power to revoke the uses he has appointed, and afterwards revokes, the effect of such revocation is, that all the uses created by the original settlement are restored, including *A.*'s original power of appointment. But if *A.*, in exercising his power under the settlement, reserves not only a power of revocation, but also a fresh power of new appointment to be exercised by the same or any other deed, and afterwards exercises the power of revocation

only, the effect then is, that all the uses created by the original settlement are restored *except A.'s original power of appointment*; that original power is not restored because *A.* has thought fit to create and reserve to himself a *new* power of appointment, which is still subsisting, and which has thus become substituted for his old power; and then the lands stand in effect limited thus: to such uses as *A.* shall *under his new power* appoint; and in default of such appointment, to the uses declared by the original settlement. And the same principle will apply to the case where, by the original settlement, lands are settled to such uses as *A.* shall appoint; and in default, &c., to such uses as *B.* shall appoint; and in default, &c., to certain specified uses: if *A.* exercises his power by deed, reserving a power of revocation, and also a power of new appointment, and afterwards exercises the power of revocation only, the effect is, that the new power of appointment which *A.* has thus created and reserved for himself becomes substituted for his old power of appointment, and the lands stand in effect limited thus: to such uses as *A.* shall appoint *by virtue of his new power*, and in default, &c., to such uses as *B.* shall appoint; and in default, &c., to the uses declared by the settlement. And this is exactly what occurred in *Montague v. Kater*. The husband and wife having, when they exercised their joint power of appointment, reserved to themselves not only a joint power of revocation, but also a new joint power of appointment, when they exercised their power of revocation their new joint power of appointment still continued to subsist, and they might have exercised it at any time thereafter; it thus became substituted for their original joint power of appointment in the settlement, but of course not for the *other* power of appointment in the settlement, which was given to the *survivor*; and the lands

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then stood in effect limited thus: to such uses as the husband and wife should jointly appoint *under their new joint power*; and in default, &c., to such uses as the survivor of them should appoint; and in default, &c., to the uses declared by the settlement; so that as they never afterwards exercised their joint power, upon the death of the wife the power to the survivor came into operation, and was well exercised by the surviving husband.

This appears to me the true ground for the decision in *Montague v. Kater*. And not only was there no necessity, in order to arrive at that decision, to resort to the reason assigned in the judgment, but that reason is made to rest entirely upon a foundation which, when examined, proves not to afford it the least support.

I have hitherto been considering what would have been the effect if Mrs. *Evans*, having by the deed of 1830 reserved to herself a power of revocation, and also a power of new appointment, had afterwards executed a deed exercising a power of revocation only. But in fact, by the next deed, which was that of 1833, she exercised both the powers simultaneously, and she thereby again reserved to herself powers of revocation and new appointment.

It is obvious that all the observations I have made as to the effect of the reservation of the powers of revocation and new appointment in the deed of 1830 are equally applicable to the similar reservation in the deed of 1833. But this further observation arises with respect to the deed of 1833 (though it is hardly necessary to resort to it in support of my decision of the case), viz. that it was not, like the deed of 1830, an exercise of a

primary power, that is, a power preceding the uses declared, but an exercise of powers of revocation and new appointment. Now Lord *St. Leonards* is of opinion (and he supports that opinion by reference to decided cases) that even where a power of revocation *only* is reserved in a deed exercising a power, and such power of revocation is afterwards exercised, although such revocation will have the effect of restoring the original power, if the deed which reserved the power of revocation was made in exercise of a *primary* power, yet such will not be the effect if the deed reserving the power of revocation was itself made in exercise, not of a *primary* power, but of powers of revocation and new appointment. So that, according to this very high authority, (the highest on the doctrine of powers,) even if the deed of 1833 had reserved *only* a power of revocation, without reserving any power of new appointment, the subsequent exercise of such power of revocation would not have the effect of restoring the original power.

By the deed of 1835, Mrs. *Evans* repeated the same process as she had done by the deed of 1833; that is, she reserved (as she had done by the former deeds) fresh powers of revocation and new appointment. She then retained no power whatever of new appointment, except the fresh power of new appointment expressly reserved by this deed of 1835, which was a power to appoint by deed only. She retained no power to appoint by will. Having the new powers of revoking and appointing by deed reserved by the deed of 1835, she might either (as she had done on former occasions) exercise them both simultaneously by one deed, or she might, if she pleased, exercise them by different deeds executed at different times, first exercising the power of revocation by one deed, and afterwards, at any interval of time, exercising the power of

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new appointment by another deed. In fact, she was authorized to do this by the express terms of the reservation of those powers in the deed of 1835, as well as in each of the two prior deeds. And if she chose to adopt this course, and exercised by one deed her power of revocation without exercising by the same deed her power of new appointment which she had reserved by the deed of 1835, she would still retain this power of new appointment, and she would retain no other power of appointment.

Now what she did subsequently to 1835, was just adopting the course I have been suggesting. Having, under the deed of 1835, the two powers, one to revoke the existing uses, and the other to appoint new uses, and having the right if she pleased to exercise the first of them by one deed, leaving the second to be exercised by any subsequent deed, but by deed only, she executed the deed of 1836, by which in exercise of the first of those two powers she revoked the existing uses, leaving still subsisting in her the second of those two powers; viz. the power to appoint new uses by another deed, but only by deed. I am utterly at a loss to understand how or why this state of circumstances should have the effect of reviving, or recreating, or re-restoring the original power of appointment reserved by the settlement of 1794. The effect of the revocation by the deed of 1836 was, as I apprehend, simply this, that the new power of appointment which Mrs. *Evans* had created and reserved to herself by the deed of 1835, became substituted for the original power of appointment contained in the settlement of 1794; and all the uses which she had appointed and declared by the several deeds of 1830, 1833, and 1835 having been revoked, the lands then stood in effect limited to such uses as she should appoint under and by

virtue of the new power of appointment which was created and reserved by the deed of 1835, and which was still a subsisting and operative power, and in default of such appointment to the uses declared by the original settlement of 1794. And as by the terms of the reservation of this new power of appointment she had expressly restricted herself to the exercise of it by deed, she had no power to appoint by will.

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And I may add (though it is unnecessary to resort to it), that as the deed of 1835 was an exercise, not of a primary power, but of the powers of revocation and new appointment reserved by the deed of 1833, according to the authority of Lord *St. Leonards*, even if the deed of 1835 had reserved *only* a power of revocation, without reserving any power of new appointment, the exercise of that power of revocation by the deed of 1836 would not have the effect of reviving or restoring the original power of appointment reserved by the settlement of 1794; *à fortiori*, it cannot have that effect, when the deed of 1835 expressly reserves a new power of appointment to be exercised by deed only.

To prevent any misapprehension as to the grounds and reasons of my decision, I will here, at the risk of repetition, recapitulate them in the form of propositions.

1st. That a power to appoint by deed or will does not constitute two separate and distinct powers, but is a *single* power, with a restriction on its exercise, requiring it to be exercised by one or other of those two instruments, but leaving to the donee the option, within the limits of that restriction, to choose which instrument he will use in exercising the power. I have already stated my reasons for this proposition.

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2ndly. That powers of revocation and new appointment are two separate and distinct powers. This is clearly laid down by *C. J. Bridgman*, in *Grange v. Twing* (a), is assumed in *Langley v. Brown* (b), and is adopted and affirmed without hesitation by Lord *St. Leonards* in his Treatise on Powers, and as I believe by all other writers. And further, that where by the terms of the reservation of powers of revocation and new appointment, the donee is authorized to exercise them at his option either by the same or by different deeds, if he first exercises by deed the power of revocation only, the power of new appointment still continues to subsist, as a valid operative power, capable of being exercised by a subsequent deed. And admitting that it is competent to the donee of such powers, exercising only the power of revocation, to release, or extinguish, or destroy the power of appointment which was reserved to him, yet the mere exercise of the power of revocation alone will not *per se* have any such effect.

3rdly. That where a person has a *general* power of appointment by deed, whether it be what is called by Lord *St. Leonards* a *primary* power, (i. e. a power *preceeding* the uses declared in default of appointment,) or be a power of appointment connected with a power of revocation, and *following* the uses declared by the instrument creating the power, and exercises that power of appointment, and by the deed exercising that power reserves to himself a new power of appointment—whether such new power be reserved as a *primary* power, or as connected with a power of revocation, such power so reserved, is to all intents and purposes a *new power* newly created by him, and is not the old

(a) Bridg. 107.

(b) 2 Atk. 195.

power which he has exercised ; and that it is equally a new power, whatever be the kind or degree of restriction which he has thought fit to impose on its exercise, and whether he imposes on it precisely the same kind and degree of restriction which was imposed on the exercise of the old power, or a greater or a less degree of restriction.

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4thly. That there is a wide difference between the case where the donee of a general power of appointment exercising it by deed, reserves to himself a power of revocation *only*, and the case where he reserves to himself not only a power of revocation, but also a power to appoint new uses ; and that whatever may be the effect of the subsequent exercise of the power of revocation where a power of revocation *only* has been reserved, the effect is very different where a new power of appointment is reserved as well as a power of revocation, and the power of revocation only is exercised. And that even assuming that in the former case the effect of the revocation would be to restore the original power, yet in the latter case the creation and reservation of the new power of appointment effectually prevents the restoration of the original power.

The decision, therefore, in *Evans v. Saunders*, was supported as to the invalidity of the will as an exercise of the power. As to the claim of the creditors, that was acquiesced by the Defendants, on the authority of *Follett v. Follett*, cited *ante*, p. 656.

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22nd and 23rd
June.

Pleading.
Parties.

A bill by one member of a Company on behalf of himself and all others, except the Defendants, prayed an account of the receipts and payments of the Defendants on behalf of the Company, and the payment of what should be found due to the Plaintiff. It appeared that there were circumstances which made the interest of some of the persons purporting to be represented by the Plaintiff, different from his.

Held, that this case was within the 49th section of the 15 & 16 Vict. c. 86 ; and the Court could treat

the absent Plaintiffs as Defendants, and determine whether a decree should be made ; and accordingly the Court decreed an account, giving liberty to certain shareholders to attend the proceedings in Chambers.

CLEMENTS v. BOWES AND OTHERS.

THE bill was by one of the share or scripholders of a certain joint-stock Company or projected Company, called the *Hull and Lincoln Railway Company*, on behalf of himself and all other shareholders in the said Company, other than and except the Defendants. It stated that in the year 1845, a subscription was commenced by several persons with the view of forming a Company for making, &c. a railroad from the town of *Hull* to the city of *Lincoln*, to be called the *Hull and Lincoln Direct Railway Company*, and which projected railway Company or scheme was duly registered, &c. That the printed prospectus of the said projected Company was headed, "*Hull and Lincoln Direct Railway*. Registered provisionally. Capital 500,000*l.*, in 25,000 shares of 20*l.* each. Deposit 2*l.* 2*s.* per share." It stated the application by the Plaintiff for 500 shares, and payment of his deposit ; that he afterwards purchased 115 shares. It then stated, that in the then current parliamentary session an Act was applied for by or on behalf of the said projected Company, and the sum of 26,250*l.* was on the 4th of February 1846 deposited with the Accountant-General, in conformity with the Standing Orders of the House of Commons, and leave was given to bring in a bill for incorporating the said Company, but such bill was thrown out in the House of Commons, and the projected scheme thereupon fell to the ground. That *John Bowes, Henry*

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Smith Bright, John Hall, John Egginton, and William Goodlad Todd, were appointed the Finance Committee of the said proposed Company, and all deposits which were made in respect of shares were placed under the exclusive control and at the disposal of the said Defendants, who accepted and acted in the control and disposition thereof; and they the said Defendants were authorized and empowered to make out, and settle, and adjust the accounts thereof, they being answerable and accountable to the shareholders of the said Company. And it alleged that the said Defendants became and were liable and accountable to all the shareholders for all receipts and payments made to or by or in the name of the said Company. It then stated the Plaintiff's application to the Defendant *Todd* for a return of his deposits, and the answer of *Todd*, explaining that the whole deposits could not then be returned; and inclosing a copy of an advertisement offering a return of 17s. 6d. per share in respect of the balance of deposits received, and a printed form of a letter of application for payment of such amount. That, not being satisfied with such communication, he did not sign or adopt the said last-mentioned letter, and he declined to transmit his scrip certificates to the solicitors of the said Company, or to accept the proposed payment of 17s. 6d. per share. That, having afterwards reason to believe that a larger amount ought to have been returned, Plaintiff required a proper statement and account of the amounts received and paid on account of the said Company; and such account not having been delivered, Plaintiff's solicitor, Mr. *William Lane*, after some correspondence with the said *William Goodlad Todd*, received from Mr. *J. G. Collins*, who was then acting as a secretary or accountant of the said Company, a letter which was in the following words and figures (that is to say) :

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"Hull and Direct *Lincoln* Railway Office,
 160, *High-street, Hull*, 31st *October*, 1846.

"Sir,—I am desired by the Committee of the above-named Railway Company to inclose you a statement of the Receipts and Expenditure as requested by you on the part of *B. Clements*, Esq., in your letter to Mr. *W. G. Todd*. You will observe that nearly 1000*l.* deduction has been obtained in settling the bills of the Engineer and Surveyor; the Committee hope to obtain a considerable reduction from the Solicitor's bills, and this matter has their earnest attention.

"I am, Sir,

"Your obedient Servant,

"J. G. COLLINS.

"*W. Lane*, Esq., 4, *Bedford-place, Russell-square*."

That the letter inclosed a statement purporting to be an account of the receipts and expenditure of the projected Company. (The result of such account was a statement of receipts by deposits, &c., of 26,919*l.* 10*s.*, of expenditure of 18,059*l.* 10*s.* 10*d.*, including therein a sum of 10,303*l.* 2*s.* 6*d.*, being the return of 17*s.* 6*d.* per share on 11,775 shares, monies yet due amounting to 7023*l.* 6*s.* 2*d.*, 848*l.* 15*s.* reserved for payment of 17*s.* 6*d.* per share on 970 shares outstanding, and 987*l.* 18*s.* for a further return of 1*s.* 6*d.* per share.)

The bill then stated the bringing of an unsuccessful action against *Todd* for the return of the Plaintiff's deposit. It then stated an application for and the rendering of a further account, which it alleged was erroneous; and it stated an application for the return of the Plaintiff's deposit, and the refusal of the Defendants *Howes*, *Wright*, *Hall*, *Egginton*, and *Todd*, to make such return.

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It then stated the circumstances attending a mortgage of some of the Plaintiff's shares to certain persons ; and that the Defendants paid to the mortgagees, without the Plaintiff's consent, 17s. 6d. per share, and the delivery to the Defendants by the mortgagees, of the shares so pledged.

The Plaintiff charged that the Defendants were liable to him on the mortgaged shares for the difference between the 17s. 6d. per share and what should be found due to him in taking an account upon the shares. It then stated the deposit of 115 of the Plaintiff's shares with the Defendant *Todd's* solicitor, in respect of costs of the Plaintiff's unsuccessful action, and the payment to such solicitor of 17s. 6d. per share on them ; and that the Plaintiff never consented to take 17s. 6d. per share on these or on his other shares. The bill charged that the Defendants had repaid themselves *in full* in respect of the deposits on some of their shares.

It contained the usual charge in such bills, of the number of the shareholders, and the impossibility of making them all parties, and that all the persons not parties as Defendants, had a common interest with the Plaintiff in having the property of the Company got in and secured, &c.

The prayer was for an account of the monies received, &c., by the Defendants, in respect of deposits paid upon shares applied for or agreed to be taken, and an account of the capital of the Company, of the payments, costs, and expenses of the Defendants in the management of the affairs of the Company, and of the clear residue after such account ; and that the amount due to the Plaintiff

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and the other shareholders on behalf of whom he sued, after giving credit for the accounts received by them, (including the sum of 398*l.* 2*s.* 6*d.*, the costs of the Defendant *Todd*), for which he was willing to give credit, might be paid to the Plaintiff and the said other shareholders.

The answer explained the transaction by which some of the deposits appeared to have been repaid in full, by a statement that those deposits were not real, but only loans by some of the shareholders in order to comply with the standing orders. This related to thirteen sums of 210*l.* each, returned to certain shareholders. The other material facts are stated in the judgment.

The cause now came on to be heard.

Mr. *Willcock* and Mr. *E. G. White*, for the Plaintiff, stated the case, and asked for an account, according to the prayer of the bill.

Mr. *Bacon*, Mr. *Neale*, and Mr. *Schwyn*, for the Defendants, objected that the Plaintiff sued on behalf of himself and all others, except the Defendants, without any evidence that anybody but himself was dissatisfied. If this account is taken, the result will almost inevitably be, or at any rate may be, that the shareholders who have received their 17*s.* 6*d.* per share will have to refund some part of it. Has the Plaintiff, in the absence of the other shareholders, a right to impose on them such a liability? He may choose to incur it, but he cannot pledge them to incur it. This is the same case as *Grand Trunk Railway v. Brodie (a)*. The decree here asked is, in effect,

(a) 9 Hare, 823.

a winding-up order, but to be carried out by a process more expensive and inconvenient than under the Winding-up Acts.

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The shareholders who have had the 17s. 6d. per share have taken no steps to repudiate the transaction. They show therefore, at any rate, that they do not mean to take less; besides, there is the question of the thirteen sums of 210*l.* returned under special circumstances to the directors. Those sums must be accounted for, and may have to be refunded; and many of the persons who have received those sums are not before the Court. The Plaintiff affects to represent them, but he cannot; he does not and cannot offer, so as to bind them to refund on their part. Further, the committee of management had the whole power of management of the Company intrusted to them, and they are not before the Court - *Carpenter v. Weiss (a)*.

Mr. *Willcock*, in reply, on the question of misjoinder, referred to the 49th section of the 15 & 16 of the Queen, cap. 86.

The VICE-CHANCELLOR :

In this case *Clements* files a bill on behalf of himself and all other the shareholders, except the Defendants, against *Bowes* and four other persons, the five being what was called the Finance Committee: by it he calls for an account of sums received by way of deposits on the shares, and for distribution among the shareholders of what, on taking such account, shall appear to be the balance.

The bill represents, that the Company being projected

(a) 5 De G. & Sm. 402.

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and *Clements* and others having had shares allotted to them, the bill failed; that many of the shareholders had paid deposits into the bankers of the Company: the Defendants say they rendered an account to the Plaintiff, representing that they had received a sum of 26,919*l.* 10*s.*; that they had paid about 18,000*l.*; that there were other sums to be paid, amounting to about 7000*l.*; that there would then be a surplus of 987*l.* 18*s.*; and that surplus would amount to a farther return to the shareholders, beyond the 17*s.* 6*d.*, of 1*s.* 6*d.* per share. With that account the Plaintiff was dissatisfied, and he brought an action against *Todd*, one of the Finance Committee, to recover his whole deposit. In that action he failed, and then he called for a better account; the answer was, that no better could be given. The Plaintiff says, that as to a great portion of his shares, he had mortgaged them, and the mortgagees had taken the 17*s.* 6*d.* Then he charges the Defendants with this: he says that besides the 26,919*l.* 10*s.*, they received more, because it is stated by the parliamentary contract that the amount of deposit was more, and that the Defendants had received deposits to the extent of 2730*l.* The Plaintiff says next, "You, the Defendants, have repaid to yourselves certain deposits in full; and if you only return 17*s.* 6*d.* to the other shareholders, you ought only to have retained the same for yourselves."

The Defendants, by their answer, admit that they were the Finance Committee, and that they acted as the agents of the Managing Committee. But they say they did not receive *deposits* beyond 26,919*l.* 10*s.*, because they say the receipt by them of money beyond that, was not by way of deposit, but of loan. There were thirteen shareholders who joined in such loan; it was found necessary to deposit a certain amount in order to

comply with the standing orders of Parliament: that could not be raised unless all or some of the shareholders contributed, and an arrangement was come to by which, instead of treating it as a loan, each of these thirteen shareholders should agree to take one hundred more shares than he had, or intended to have; and by each paying the two-guinea deposit on such shares, they should make up the sum requisite to be deposited according to the standing orders. That arrangement was carried into effect, and each of these thirteen shareholders actually signed the parliamentary contract as a subscriber for an additional hundred shares. They signed their names in the schedule, sealing the deed, and stating that they had paid deposits to the amount of 210*l.* on their shares, and contracting with the other members of the Company that they would pay up the whole of their money. Thus the loan was effected; that is, the transaction which it is insisted by these thirteen shareholders was only a loan. But it was represented to Parliament and to the other shareholders that it was not a loan, but a taking of shares, and a payment of the deposits thereon. The Plaintiff's bill does not go into this case, but the Defendants themselves state it: they state it by way of defence, to show how they have discharged themselves from the receipt of more than 26,919*l.* 10*s.* They say, "We have not repaid ourselves in full; what we have done, is to repay to ourselves and to the other shareholders the loan advanced by us and them." Now, therefore, subject to the question of the right of the Plaintiff, in point of form, to sustain this suit, the matter stands thus.

The whole number of the shareholders, except the five Defendants, who, for the present, I will assume are to be treated as Plaintiffs, call upon the Defendants to account

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for money received by them ; and *prima facie* there is a clear case of a right to an account. These five persons hold property belonging to all the shareholders ; and all the shareholders, supposing them all to be actually Plaintiffs, have a clear right to an account. But then it is objected on that point, that the Plaintiff, as the record is framed, has not a right to sue.

Now the first objection taken is, that this is a case proper for a winding-up order, but not for a suit, and it is said that it is in the discretion of the Court to refuse its interference by suit, and to leave the parties to proceed under the Winding-up Acts. Now if there is in fact such a discretion in the Court, (though I cannot say that there may not be suits like this, which would be very dilatory and very expensive,) yet it must be a strong case which would induce me to prefer the proceedings under the Winding-up Acts (of which my experience while Master has led me to form an opinion by no means favourable to its superiority) to the proceedings by suit in this Court. But however that may be in a very complicated case, this appears to me to be one of the simplest of the class. It is not a case in which I think I ought to say I would refuse relief, and leave the parties to the Winding-up Acts.

The second objection is, that the bill is filed by a party who has had already an account rendered to him by the Defendants, showing all the receipts and payments, and showing all the matters relating to the business of the Company. Now, clearly that does not alone deprive him of his right : a party has a right to have an account taken with the aid of the machinery of this Court, and is not precluded because the Defendant has given him an account. Still, the Plaintiff might be taken to ac-

quiesce in the account so far as he has not objected to it ; but he does object on one point. If that ground of objection were removed, there is no complaint. The bill is founded on that special objection, and the Plaintiff cannot have a general account if that were removed. The special objection is this, that there has been more than the 26,919*l.* 10*s.* received by the Defendants. The Defendants say the excess was a loan, not a deposit. As the only relief asked is in respect of what has been received for deposits, the removal of that objection would go to the whole bill. Then it comes to this : the thirteen shareholders who paid this money say they did it as a loan ; but it is admitted that they agreed to make the payment as if it were a deposit ; and the question is, whether, as between those thirteen and the general body of shareholders, they can be heard to say they made the payment as a loan. Suppose this case had been made the subject of a winding-up order, the Master would beyond all question have made these thirteen shareholders contributories in respect of their 1300 shares, and the Court would have affirmed that. I think there is no question but that such a transaction as that of the advance of these monies was a fraud on the standing orders of the House of Commons ; and in the same sense, that is, in a legal sense, it was a fraud on the other shareholders.

The Parliamentary Committee reported these thirteen persons as shareholders in respect of the 100 shares each, and they cannot, I think, be allowed to say, " We are not shareholders. The transaction was merely used as a blind to mislead Parliament." I must hold it a fraud on the standing orders, and that these thirteen persons are bound as shareholders. If I am right in that, there is an end to this objection to the bill.

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The next objection to the bill is, that the Plaintiff sues on behalf of himself and all others, except the Defendants. Now the general principle is, that a person cannot file a bill on behalf of himself and all others, unless, if all those others were co-Plaintiffs on the record, the bill, as the bill of all, could be maintained. I must assume that the case is the same as if every individual shareholder, except the Defendants, were actually a co-Plaintiff.

Then it is said, among those are nine of the thirteen who paid the 210*l*. They are interested (having had it returned) in supporting the propriety of its having been returned; in that respect, their interest is adverse to that of the other shareholders; and therefore it is said, if they were actually on the record as co-Plaintiffs, there would be misjoinder. The question is, in the present state of the law, is that a ground for dismissing the bill?

The language of the 49th section of the Act (the 15 & 16 of the Queen) is explicit; and the new doctrine is not left to the discretion of the Court: it is imperative in the Court to follow it; and I am of opinion that if the Act applies to cases where the parties are named on the record, it will apply equally to cases where a Plaintiff sues on behalf of himself and all others, &c. The Act having authorized the Court either to allow the cause to stand over for amendment of the record, or to treat at the hearing some of the Plaintiffs as Defendants, and to deal with the case accordingly—having armed it with power to do justice—it appears to me, that the law of this Court as to misjoinder is entirely altered: and the objection taken on this point is removed.

The next objection is this: it is said the present De-

fendants are only the agents of the Committee of Management, and that they ought to be parties. In effect, they are parties as represented by the Plaintiff. He represents every member of the Committee of Management, not specifically as the Committee of Management, but as shareholders; and what does the bill seek? Only an account from the five Defendants of what they have received; of monies admitted by them to have been received as agents of the Committee of Management, being monies belonging to the shareholders at large: the Committee of Management have no more interest than every other shareholder. I do not see the necessity on this account of having the Committee of Management before the Court: if the bill had been a bill for a general account, it might have been so; but the bill is merely for an account of the deposits received by the Finance Committee; of what they have paid; and of the balance; and the presence of the Committee of Management as the bill is framed would be of no use.

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I entirely concur in the decision in *Carpenter's case*, and do not mean, in deciding this case as I do, to decide at all against that case.

These are the principal objections to the frame of the record, and I am of opinion that none of them are tenable against the right of the Plaintiff to sustain his bill.

The next objection is, that in this case the Finance Committee having by arrangement come to a resolution that they had sufficient funds to return 17s. 6d. on each share, they issued an advertisement to that effect; that many shareholders accepted it, among them the assignees of the Plaintiff; and that the 17s. 6d. per share was paid. But the Plaintiff does not complain of that: he is will-

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ing to give credit for that amount. It is said that wherever any shareholder has received his 17s. 6d. per share, if this suit is carried on there may be a right to call upon him to refund; and consequently those who have received 17s. 6d. per share have in fact an interest adverse to the Plaintiff; that is, however, no more than an objection for misjoinder, which is within the 49th section of the Act.

For the reasons stated, I think none of the objections can prevail. As to the nine shareholders who have contributed the 210*l.* each, I think they are entitled to be served with, and to attend the proceedings in taking the account. The decree will be for an account nearly in the terms of the prayer of the bill; declaring that the Defendants are entitled to credit for the 17s. 6d. per share paid by them.

AN INDEX TO THE PRINCIPAL MATTERS.

AGREEMENT.

An agreement was entered into between a landowner and a company having compulsory powers to take land, that if the company should make their line, they should pay for such, if any, of the land as they should so take at the rate of 500*l.* per acre, and, in consideration of such agreement, the landowner agreed that he would permit the company to take such land under the authority of their Act on those terms. The landowner died, and then the company took some of his land. Held that the money belonged to his real, and not to his personal representatives. [*Ex parte Walker, Re The Shrewsbury and Hereford Railway*] . . . 508

ALLEGATION.

A bill alleged the plaintiff to be entitled under wills which it set out, as tenant in tail; it alleged that the defendants claimed under the same wills as tenants in fee. The question as raised by the pleading was one of pure construction of these

wills. The bill also alleged the plaintiff's pedigree as tenant in tail in the following manner; it alleged that A. left B., his niece, and C., his *great nephew*, his co-heirs, who thereupon became the right heirs, and issue in tail of D. Held that this was a sufficiently certain allegation of the title of B. and C. as such co-heirs and issue in tail claiming through A. [*Wright v. Vernon*] 344

AMENDMENT.

A bill was filed by A. and his wife, alleging title in respect of the wife's estate tail. The defendant demurred for want of equity. While the demurrer was standing for argument the wife died, and then A. filed a supplemental bill, alleging a disentailing deed before the date of the original bill, under which deed A. claimed in fee. Held that in this state of things the demurrer could not be heard; that such an alteration in the record was not properly the subject of either supplemental bill, or of original bill in the nature of a supplemental

bill, or of a bill of revivor, nor properly of amendment; but the original bill ought to have been left to take its course, and a new bill filed stating the real title. [*Wright v. Vernon*] 68

AMENDING BILL.

The 67th and 68th orders of 1845 apply to an application to the Court, as well as to an application to the Master. A motion for leave to amend, by striking out the name of a plaintiff and making him a defendant, must be supported by the affidavits required by the 67th and 68th Orders of 1845. [*M'Leod v. Lyttleton*] 36

AMENDING PETITION.

[*Robinson v. Harrison*] . . . 307

ANNUITIES.

Testator gave his residue to his wife for life, and after her decease one-seventh of it to each of six of his children; he gave the other seventh to be laid out in government annuities for his son A. for life, to be paid into his hands from time to time, without power of anticipation; with a limitation over in the event of his being bankrupt, insolvent, &c., in the lifetime of the testator or after his death. A. died in the lifetime of the tenant-for-life, not having been bankrupt, &c. Held, that his representatives were entitled to one-seventh of the residue. [*Day v. Day*] 569

APPOINTMENT.

1. General propositions concerning the nature, exercise, and exhaustion of a general power to appoint by deed or will, and concerning powers of revocation and new appointment. [*Evans v. Evans*] 654

2. A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities, 7000*l.* $\frac{1}{3}$ per Cent. Reduced, and 3150*l.* New $\frac{1}{4}$ per Cents; also certain shares in a company; and 54,000 French Rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife, for her separate use, subject thereto for the husband and wife for their joint lives; if the wife should predecease her husband, then on trust to raise 3000*l.*, over which a general power of appointment was given to the wife; and as to the rest, after the death of the wife so predeceasing her husband, for him for life, and after his death in trust for all and every or such one or more exclusively of the other or others, of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money and future or executory or other trusts (such annual sums of money and future or executory or other trusts being for the benefit of the said relations in blood of the said Sarah Harvey within the degree aforesaid, or some or one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by two or more credible witnesses, direct or appoint; and in default of such di-

rection or appointment, and so far as any such direction or appointment should not extend, in trust for such person or persons as, under the Statute for the Distribution of the Effects of Intestates, would, at the decease of the said Sarah Harvey, have become entitled thereto as her next of kin, in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof his widow, and intestate. The settlement also comprised certain plate, linen, china, &c., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, &c.; and as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said:—"I do, by virtue of the power and authority reserved to me in and by the deed of settlement, made, &c., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows:—"And after payment of my just debts,

funeral expenses, the charges for proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies, and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Harvey, the said Charles Day and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security during the respective lives of my said nieces, and the dividends or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease,

be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally, share and share alike; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same; and in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates."

Held, that the appointment in favour of the daughters of John Harvey was not void *ab initio*, because it might comprise persons not living at the death of the testatrix and within the eighth degree; nor did it become void *in toto*, because it did in fact at the time of distribution include such persons; but that it was good *pro tanto*; that the attempted limitation to the husbands of the nieces was bad, as they were strangers; and the limi-

tations to their children, grandchildren, or other relations in blood, was void for remoteness. [*Harvey v. Stracey*] 73

3. A. made his will and gave personalty to B., a married woman, for life, and after her death as she should appoint, and in default of appointment, to her husband, and if she should survive him and make no appointment, then to her children. B. had three children, and by her will she appointed, after her husband's death, 2000*l.* between two of her children, and 1500*l.* to the other, and she appointed the residue to her three children by name, in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children, (—) to another, and the residue to the third. Held, that the husband had no power to exclude either of the children, that his appointment was therefore bad, and that the appointment of the wife took effect in favour of the three children. [*White v. Wilson*] 298

BANKRUPT.

Sloper, in 1833, mortgaged certain real estate to Sievewright, with a power of sale, under which the property was sold in 1842 to a purchaser, who transferred his contract to Sievewright. There was a balance after paying off Sievewright; and there being accounts between Sloper and Matthews, this balance was placed, under a deed of 25th June, 1842, in the hands of trustees, to be dealt with by arbitration between Sloper and Matthews. In 1834, Sloper had made an equitable mortgage of the property to Matthews. In January, 1840, Matthews deposited these deeds with Waldron,

the plaintiff, by way of equitable mortgage. In April, 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May, 1843, Matthews deposited the deeds, by way of mortgage, with Pinckney, who now held them. In 1846, Matthews became bankrupt. Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him. The Court expressed an opinion that, the real estate being converted into personalty before the bankruptcy, the right of Matthews was merely a right to receive a certain sum of money; and that, no notice having been given by the plaintiff or the holder of the deeds to the trustees, the right to receive the money remained in the order and disposition of Matthews, and passed to his assignees. This point did not, however, arise for express decision. [*Waldron v. Sloper*]. . . 193

BILL.

A bill was filed by A. and his wife, alleging title in respect of the wife's estate tail. The defendant demurred for want of equity; while the demurrer was standing for argument the wife died, and then A. filed a supplemental bill, alleging a disentailing deed before the date of the original bill, under which deed A. claimed in fee. Held that in this state of things the demurrer could not be heard; Vol. I. N.S.

that such an alteration of the record was not properly the subject of either supplemental bill, or of original bill in the shape of a supplemental bill, or of a bill of revivor, nor properly of a bill of amendment, but the original bill ought to have been left to take its course and a new bill filed stating the real facts. [*Wright v. Vernon*]

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BOND.

1. A. being indebted to B., C., and D., three sisters, who were his near relations, partly on his own account and partly as executor of his father, executed to them a bond for 500*l*. At the time of the giving of the bond, A. objected to give it, and agreed to do so only on a verbal representation that it was not intended to be enforced, unless B., C., and D. should come to want, an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death in the hands of the survivors, and after the death of C., in the hands of D., whose property (by mutual arrangements) it was at the time of her death. On the bond was found the following endorsement: "This bond is never to appear against A.—Witness C., D." This was dated eleven years after the date of the bond. It was not made clear that C.'s name was written by herself; it was said that D. had written it. It was, however, proved that if D. had written it, she did so with the authority of C. Held that, without saying whether the endorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put

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- in suit, the action would be restrained; and that there was nothing due on the bond to the estate of D. [*Major v. Major*] . . . 165
2. A creditor by bond in which the heirs are named takes priority over a specialty creditor under a security in which the heirs are not expressly named. [*Richardson v. Jenkins*] 477

CALLS.

An allottee of shares in a projected railway company paid on them; he also executed the subscribers' agreement, a deed under seal; but he did so on the faith of a letter written by the provisional directors before the execution of the deed, by which they undertook to return the whole deposit if the Act should not pass. The deed was in the usual form, between all the shareholders with trustees, to perform the covenants, and contained a covenant to indemnify the provisional directors whether the Act should or should not pass. Held, that the deed, being a contract by each shareholder with all the others, its effect could not be destroyed in favour of any shareholder by a contract between him and a certain number of shareholders; and consequently, the allottee who had signed it was not protected by the letter of the provisional directors, against a call. [*Dover and Deal Railway Company, Ex parte Francis Mowatt*]*

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CHANCERY AMENDMENT ACT.

1. The 44th section of the 15 & 16 Vict. c. 86, does not apply to the

* This case was reversed on appeal.

- case where the estate to which it is desired to appoint a representative, is the estate being administered by the Court. [*Silver v. Stein*] 295
2. The birth of one of a class, entitled as such after the institution of a suit, is within the fifty-second section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree. [*Fullerton v. Martin*] . . . 238
3. A lease was granted by A. to two partners, the covenants being only joint at law. Bill filed by the representatives of one of the lessees, deceased, against the lessor, alleging that the lessor claimed to have a right under the covenants against the plaintiff, if a breach should arise, and praying merely a declaration that the defendant had no right. A demurrer to this bill was allowed, notwithstanding the 15 & 16 Vict. c. 86, s. 50: the meaning of that section is only to remove the objection, that a plaintiff, who might have consequential relief, prays merely a declaration of his right. It did not mean to entitle a person to have a declaration as to a claim which *may* be made by another under circumstances which may or may not happen. [*Jackson v. Turnley*] 617
4. A married woman, having a life interest to her separate use in real estate, with her husband cut timber. A suit was instituted in one branch of the Court to carry into effect the trusts of the settlement. In another branch, a suit was in existence in which a claim was made on the married woman's separate use, in respect of the timber cut. Held, that in the first suit the Court could not decide the question as to the right to cut the

timber, but the married woman securing the value of the timber cut, was allowed her income pending the suit. [*Stacey v. Southey*]
400

CHARITY.

A gift by will to a particular charitable institution, maintained voluntarily by private means. The particular institution had ceased. Held, that the gift was not to be disposed of as a charitable gift *cy près*, but failed, and fell into the residue. [*Clark v. Taylor*] 642

CONSTRUCTION OF INSTRUMENTS.

1. A gift of all the residue of my estate and effects to A., B., and C. upon trust, to collect, get in, and recover the same, and invest in stock and pay the dividends, &c., to persons beneficially entitled, A. and B. being also executors: Held to pass real estate. [*D'Almaine v. Moseley*] 629
2. A gift by will to a particular charitable institution, maintained voluntarily by private means. The particular institution had ceased. Held that the gift was not to be disposed of as a charitable gift *cy près*, but failed, and fell into the residue. [*Clark v. Taylor*] 642
3. A testator seised of real estate, and leasehold and personal estate, and among other property of leasehold collieries or mines, gave certain real estates to his son; he devised and bequeathed all his other real and personal estate upon trust, *with the approbation* of his son, at some convenient and proper period to sell and convert the same, and to invest and apply 1000*l.*, part thereof, for his granddaughter; and after giving some

small annuities, in trust to pay to his daughter 200*l.* a year, besides one-half share of the yearly income and produce of his real and personal estates; his intention being that she should enjoy an equal yearly income with his son during her natural life, treating 200*l.* a year as equivalent to the real estate given to his son; provided that his daughter's annuity should in no case exceed 600*l.* a year; and that the overplus, after 600*l.* a year to her, and 400*l.* to his son, should go to his son, but that what he called produce of his personal estate was not to be taken as the income derived from the mines, but the profit arising, after laying by 10*l.* per cent. to pay back the capital expended in plant, &c.; and subject to these gifts and devises, he gave all his real and personal estate to his son; the son was appointed, with the trustees, executor; they disclaimed and renounced, and he entered into sole possession. In taking the accounts of the testator's estate: Held, that the son had a right to apply in payment of debts all permanent personal property, before disposing of the mines. That, having paid off with his own monies debts which could not have been paid off without resorting to the mines, the debts so kept alive in his hands were a charge on the net produce of the mines. That the accumulations of the 10*l.* per cent. were a fund liable to the debts in exoneration of the mines. That, as to any liabilities due to him in respect of overpayments of debts made by him beyond the assets applicable, he would be entitled to interest. That the 1000*l.* legacy to the grand-daughter was a charge on the

- real and personal estate *pro rata*.
[*Lord v. Wightwick*] . . . 576
4. Testator gave his residue to his wife for life, and after her decease one-seventh of it to each of six of his children; he gave the other seventh to be laid out in government annuities for his son A. for life, to be paid into his hands from time to time, without power of anticipation, with a limitation over in the event of his being bankrupt, insolvent, &c., in the lifetime of the testator or after his death. A. died in the lifetime of the tenant for life, not having been bankrupt, &c. Held, that his representatives were entitled to one-seventh of the residue. [*Day v. Day*] . . . 569
 5. A railway company had power to make and maintain the railway and works on the line and upon the lands delineated in the parliamentary plan, and described in the books of reference, and to enter upon, take, and use the said lands or such of them as should be *necessary* for that purpose; "but they were not to enter upon, take, or use any of the land or property of a certain pre-existing railway company, or in any manner to alter, vary, or interfere with that railway or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized in manner in the said Act authorized, and not otherwise, one of the clauses of the Act giving certain powers to the company for effecting a junction with the pre-existing railway. Held that, there being nothing to show that it was absolutely necessary for the company, in order to effect the junction, it had no power to take, as owners, certain lands over which the line of the pre-existing railway actually passed, but there was a right to enter upon such lands by way of easement, for the purpose of effecting the junction. [*Oxford, Worcester, and Wolverhampton Railway Company v. South Staffordshire Railway Company*] . . . 253
 6. Testator devised his real estate to trustees with powers to "let" until all his nephews and nieces should attain twenty-one. And *after* his youngest nephew or niece should be of age, *then* he directed his estates to be sold, and the produce to go amongst all his nephews and nieces except two by name. He charged his rents with an annuity to A. and with payment of bond debts, but did not otherwise dispose of them. Held, first, the widow was put to her election; secondly, the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. [*Parker v. Sowerby*] . . . 488
 7. Bequest to A. and B., their executors and administrators, upon trust. B., the surviving trustee, by his will bequeathed his trust estates to C. and D., their heirs, executors, administrators, and assigns, on the trusts, and he appointed C., D., and E. executors of his will. Held, that C. and D. took only the legal estate, and that neither C. and D. by themselves, nor C., D., and E., were capable of executing the trusts. [*Re Burt*] . . . 319
 8. A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees *specially named*, except one of the classes described. Held, that this showed that by the words *specially named* the testator meant *described*

- or mentioned, and that all the legatees, whether *named* or only *described*, took shares. [*In re Holmes*] 321
9. Testator set out a schedule of his property, calling it 5000*l*. He then directed 1000*l*. to be invested in each child's name, and 1000*l*. in his wife's; interest to them for their life, and afterwards to their *descendants*, except his wife's, which was at his death to be sold and divided between them, except 200*l*. to M. L.'s child by him. Then followed in the same paper, "The above is increased by the working up of stock to 5500*l*. I wish the same division and appropriation, except that, if any share falls in, it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters. Held, that by the will alone the daughters would have taken absolute interests, but that by the will and codicil together, they took interests which, if absolute in the first instance, were defeasible. [*Bird v. Webster*] 338
10. A testator gave to his wife certain chattels, leaseholds, and certain pecuniary benefits. He gave all his freehold messuages, lands, tenements, and hereditaments, and all the rest and residue of his leasehold messuages or tenements and premises whatsoever and wheresoever to trustees for all his estate and interest therein respectively, upon trust to sell his freehold and leasehold messuages or tenements, hereditaments, and premises, &c., and to stand possessed of the monies to accrue from such sale, upon certain trusts. He directed that, until sale, the rents and profits should be applied in the same manner as he directed as to the income of the monies to arise from the sale. He gave the produce of the sale of his freehold, copyhold, and leasehold estate, and of his residuary personalty, as to one-fourth, to his wife; as to one-fourth, to one of his sisters for life, remainder to other relations; one-fourth to another sister, remainders over; and one-fourth to other persons. Before his will he had sold some of his freehold estate, and his wife had joined to bar dower. Both before and after his will he had contracted to lease parts of his freehold estate; after his will he had contracted to sell one of these parts to the lessee; and after his will he agreed to let some parts of his freeholds, with liberty to the lessee to pull down buildings and to erect others. After his death the lessee of the last-mentioned premises did pull down the buildings and erect others, thereby improving the value of the estate. Held, first, that the widow was not put to her election, but was entitled to her dower, as well as to the benefits given to her by the will; secondly, that the acts by which the value of the property was increased, not being hers, she would take her dower according to the existing value. [*Gibson v. Gibson*] 42
11. Principles on which a Court of Equity proceeds in directing and acting upon the result of an issue to a Court of law. When the verdict is such as not to decide the question involved in the issue, this Court will not go into the evidence to decide upon it itself, the object of an issue not being merely to elicit evidence, but to obtain the assistance of the opinion of a jury, under the direction of a judge.

- The 79th section of the Lands Clauses Consolidation Act applies only to the jurisdiction of equity in ordering money to be paid out, and not to that of a Court of law in determining the rights of parties in an issue. [*Ex parte the Freeman and Stallingers of Sunderland, Ex parte the Bishop of Durham*] 184
12. An agreement was entered into between a landowner and a company having compulsory powers to take land, that if the company should make their line they would pay for such, if any, of the land as they should so take at the rate of 5000*l.* per acre, and in consideration of such agreement the landowner agreed that he would permit the company to take such land under the authority of their Act on those terms. The landowner died, and then the company took some of his land. Held, that the money belonged to his real, and not to his personal representatives. [*Ex parte Walker, Re the Shrewsbury and Hereford Railway*] 508
13. Testator gave property to his trustees upon trust, to pay, distribute, and divide equally between his daughters, naming them, to be paid and assured to them as they should attain the age of twenty-one, or be married under that age, with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same. There was a power of maintenance and gifts over as between the daughters on dying unmarried under twenty-one, and if all the daughters should die under twenty-one unmarried and without leaving issue, then over. Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent. [*Taylor v. Austen*] 459
14. Testator gave long annuities to A. for life, and if she died without leaving issue her surviving, then to B. and C., to be paid to them at twenty-one, *if both living*; but if either should be *then* dead, *then* to the survivor. B. and C. both attained twenty-one, but died in the lifetime of A., who died without issue. Held, that the word *then* had reference to the death of A. without issue; and that the residuary legatee, and not the representatives of B. and C., took. [*Widdicombe v. Muller*] . . . 443
15. A. and B. being trustees, the Master found that it was uncertain whether A. was living or dead, but B. was living; afterwards B. died. Held, that A. was not sole trustee within the Trustee Act, 1850, and the 22nd section of the Act did not apply. [*Re Randall*] . . . 401
16. Testator gave personal estate outstanding on securities, to his wife for life, remainder in a moiety to six of his children, provided that if any one died before *receiving* his or her share, without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realized and the produce divided. Held, that the proviso contemplated the time when the children should be *entitled* to receive their shares, not the time of actual payment, and that the representatives of the deceased child took a share. [*In re Dodgson's Trust*] 440
17. A. made his will and gave personally to B., a married woman, for life, and after her death as she should

appoint, and in default of appointment, to her husband, and if she should survive him and make no appointment, then to her children. B. had three children, and by her will she appointed, after her husband's death, 2000*l.* between two of her children, and 1500*l.* to the other, and she appointed the residue to her three children by name, in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children, (—) to another, and the residue to the third. Held, that the husband had no power to exclude either of the children, that his appointment was therefore bad, and that the appointment of the wife took effect in favour of the three children. [*White v. Wilson*]

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See also DEEDS.

CONTEMPT.

Under an order of the Court made in a suit in which it was held that a judgment was a charge on an ecclesiastical benefice, a receiver was in possession of the funds of the benefice for the benefit of the plaintiff, subject to a due provision for the service of the church. A subsequent incumbrancer, with notice of the appointment of the receiver, issued a sequestration, and proceeded up to publication, but did not take or receive any funds of the living. Held, that this ought not to have been done without the leave of the Court; that it was an interference with the possession of the receiver, and was a contempt. [*Hawkins v. Gathercole*; *Hawkins v. Carrack*] 12

CONTRIBUTORIES.

1. A. was a member of the provisional

committee of a projected railway company, and at a meeting thereof joined in appointing solicitors and engineer, and immediately afterwards a committee of management was appointed. A.'s name was put on this without his knowledge. He never acted in any further or other way. Expenses were incurred by the solicitors and engineer subsequently to the formation of the managing committee, and by their direction; it did not appear that any other expenses had been incurred. Held, that A. was not a contributory. [*Ex parte High*]

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2. A. was an allottee of shares in a projected railway company, which failed to obtain an Act, and was never completed. He paid his deposit, but never executed any deed. Accompanying the letter of allotment was a circular from the directors, undertaking to return the deposits if an Act should not be obtained. Afterwards A., at the request of the directors, asking for the continuance of the confidence of the shareholders, wrote to the Board, requesting them to continue the undertaking. On the breaking up of the company, the directors returned the balance of the deposits remaining on their hands, and paid to A. on that account 200*l.* A. recovered, in an action against one of the managing directors, the remaining 220*l.* Held that A. was not a contributory. [*Re Dover and Deal Railway Company, Ex parte Bradshaw*] 262
3. A. became a member of the provisional committee of a projected company, which was never completed. He signed the agreement required by the Registration Act; he applied for 100 shares, under-

taking to accept them if allotted; instead of 100 shares being allotted to him, he, in common with other committee-men, was requested to take up twenty-five; he did not take them up. He was called upon then to pay two successive payments, making together 105*l.*, on which he was assured he should be protected from the claims of creditors; he did in consequence pay 105*l.* Held, that A. was not a contributory. [*In the Matter of the Winding-up Acts, 1848 and 1849, and the Wolverhampton, Chester, and Birkenhead Junction Railway Company, Ex parte Roberts*] 204

CONVERSION.

A testator gave all his residuary real estate and his stock, mortgages, and securities for money, and all other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which, at the time of his death, he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense. Held, first, that the widow was entitled to the leaseholds in specie; secondly, that the repairs were to be borne by the residue, and not by the tenant for life. [*Harris v. Poyner*] . 174

COPYRIGHT.

The first edition of a work of compilation was published before the 5th & 6th Vict. c. 45; several editions

of it were published after this Act, and not registered. Held, that as to so much of the matter contained in the original edition as was contained in the subsequent ones, the owner might sue, although those subsequent ones were not registered; but as to the new ones, the subsequent editions were books which ought to be registered, and the owner could not sue for infringement on that point. If a foreigner translates an English work, and then an Englishman re-translates that foreign work into English, that would be an infringement of the original copyright. Grounds on which fairness or unfairness in the use of a previous work is to be determined. [*Murray v. Bogue*] 353

COSTS.

1. As between the husband, creditors, and the wife, in respect of the wife's equity for a settlement, the Court will, under circumstances, give the wife more than one-half; and where the wife had been at the time of her marriage, and long afterwards, in circumstances of comfort, and was reduced to distress by the husband's embarrassments, the Court gave the costs of the petitioner and of the husband's assignees out of the fund, which was 681*l.*, 400*l.* to the wife, and the remainder to the petitioner; the wife's costs out of her own fund. [*Ex parte Pugh*] 202
2. A. became a member of the provisional committee of a projected company, which was never completed. He signed the agreement required by the Registration Act; he applied for 100 shares, undertaking to accept them if allotted;

instead of 100 shares being allotted, he, in common with other committee-men, was requested to take up twenty-five; he did not take them up. He was called upon then to pay two successive payments, making together 105*l.*, on which he was assured he should be protected from the claims of creditors; he did, in consequence, pay 105*l.* Held, that A. was not a contributory. Rule, as to the cost of an official manager appealing without sufficient ground. [*In the Matter of the Winding-up Acts, 1848 and 1849, and of the Wolverhampton, Chester, and Birkenhead Junction Railway Company*] 204

CUSTOM.

A bill was filed, alleging that by the custom of the manor money-payments were and had from time immemorial been due and payable in lieu of heriots and reliefs; that the plaintiffs were entitled to distrain; and that, by reason of confusion of boundaries, they could not distrain; but no custom of distraining was in express terms alleged. Held, on demurrer, that the bill could not be sustained; that where money payment is due, in lieu of heriots and relief by the custom, there must be also a custom of distress, and the custom must be alleged positively, and not merely by inference. [*Mayor of Basingstoke v. Lord Bolton*] 270

CY PRES.

See CHARITY.

DEATH.

A. left this country on the 9th November, 1829. On the 16th June, 1831, his brother-in-law received a letter from America on behalf

of A., describing him as having changed his name to B. Three months after this, A.'s wife sent a letter to him, addressed to him as B., by the hand of a friend, who could not find him. He was not heard of any more; and it did not appear that any other inquiries were made by his family. Held that, on this state of facts, there was not sufficient information to ground presumption of death, still less of the particular period of death. [*Re 10 & 11 Vict. c. 96, and the Trusts of the Will of G. Creed*] 235

DEBT.

A testatrix directed a sum which she said she owed to A. and B. on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being of such school," *now or hereafter to be built*. The testatrix did not in fact owe the money to A. and B., but intended it to be held by them on a secret trust for the use of the existing chapel. She did not tell them of this in her lifetime, but told her executor; and A. and B. never knew of the intention till after the testatrix's death. Held, that whether there was a valid debt or not on the promissory note to A. and B. was a question of law; but if there was no debt, it was good as a legacy. [*Longstaff v. Renison*] 28

DEBTOR AND CREDITOR.

1. A trustee under a deed the terms of which would amount to the creation

of a contract is not a specialty debtor, if he has not executed the deed, although he has acted under it. The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A *declaration* by the trustee that he will stand possessed on certain trusts, &c., is sufficient. A creditor by bond in which the heirs are named takes priority over a specialty creditor under a security in which the heirs are not expressly named. [*Richardson v. Jenkins*]

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2. A. being the holder of several policies of insurance on the life of B., and being unable to keep them up, entered into an agreement with C., for the purpose of C. keeping them up. The agreement consisted of three instruments: first, a letter, by which it was stated that C. was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond, and an equitable mortgage of certain estates. No time was specified for the repayment of the advances and interest. Secondly, a bond for 6000*l.*, referring to the letter, for repaying the advances and interest *at the expiration of six months from the death of B.* Thirdly, an agreement, also referring to the letter and to the deposit of the policies to secure the payment of the advances and interest *at the expiration of six calendar months from the death of B.*, by which agreement the advances and interest were secured to be paid at six months after the death of B., upon certain estates. A. died, living B., leaving a considerable amount of advances and interest unpaid, and having before his death assigned the policies to

trustees, for his creditors. C. now filed his bill, claiming to have all his advances and interest paid; and that the agreement might be varied, and made to conform to the letter; and that, if necessary, the policies might be sold. Held, first, that, upon the true construction of the three instruments, C. had no security on the policies available till after the expiration of six months from the death of B.; secondly, that the agreement could not be rectified, there being nothing to rectify it by, except the letter itself, the letter and agreement being incorporated in effect into one instrument, and the letter not specifically pointing out the time when the security was to be available. [*Brougham v. Squire*] . . . 151

DEEDS.

Real estate was settled on the husband for life; remainder to his wife for life; remainder to the heirs of the body of the wife; remainder to the right heirs of the husband; the husband and wife barred the wife's estate tail; and by that and other deeds it was settled to such uses as the husband should appoint. He appointed, by a deed of July, 1817, to such uses as "he and his wife should jointly appoint, and in default to himself for life; remainder to his wife for life; remainder to his son in fee." The husband and wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made, under the power in the deed of 1817, another mortgage which limited the equity of redemption to the husband and wife, "their heirs or assigns, or to such other persons, &c., as they

should direct;" and by a deed of even date certain terms were assigned to attend the inheritance according to the uses of the other deed of even date. Held, that the deed of 1832 was intended to vary the limitation of the equity of redemption, and defeated the limitation of the fee of the deed of 1817. [*Whitbread v. Smith*] . . . 531

not be sustained; that where money payment is due in lieu of heriots and relief by the custom, there must be also a custom of distress, and the custom must be alleged positively, and not merely by inference. [*Mayor of Basingstoke v. Lord Bolton*] 270

DOWER.

- ## DEEDS AND PAPERS.
1. Motion for production of documents belonging to a company against defendants who had been, but were no longer, trustees of the company, no other shareholders being parties. The answer admitted the documents to be in the office of the company, but not otherwise in the possession or custody of the defendants. Held, that production could not be enforced. [*Penney v. Goode*] 474
 2. Where it is sworn that documents are confidential communications, relating to the particular suit, or to another suit, which, though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. [*Thompson v. Falk*] 21

DEMURRER.

A bill was filed, alleging that by the custom of the manor money-payments were and had from time immemorial been due and payable in lieu of heriots and reliefs; that the plaintiffs were entitled to distrain; and that, by reason of confusion of boundaries, they could not distrain; but no custom of distraining was in express terms alleged. Held, on demurrer, that the bill could

1. A testator gave to his wife certain chattels and leaseholds, and certain pecuniary benefits. He gave all his freehold messuages, lands, tenements, and hereditaments, and all the rest and residue of his leasehold messuages or tenements and premises whatsoever and wheresoever to trustees for all his estate and interest therein respectively, upon trust to sell his freehold and leasehold messuages, and tenements, hereditaments, and premises, &c., and to stand possessed of the monies to accrue from such sale, upon certain trusts. He directed that, until sale, the rents and profits should be applied in the same manner as he directed as to the income of the monies to arise from the sale. He gave the produce of the sale of his freehold, copyhold, and leasehold estate, and of his residuary personalty, as to one-fourth, to his wife; as to one-fourth, to one of his sisters for life, remainder to other relations; one-fourth to another sister, remainder over; and one-fourth to other persons. Before his will he had sold some of his freehold estate, and his wife had joined to bar dower. Both before and after his will he had contracted to lease part of his freehold estate; after his will he had contracted to sell one of these parts to the lessee; and after his

will he agreed to let some part of his freeholds, with liberty to the lessee to pull down buildings and erect others. After his death the lessee of the last-mentioned premises did pull down the buildings and erect others, thereby improving the value of the estate. Held, first, that the widow was not put to her election, but was entitled to her dower, as well as to the benefits given to her by the will; secondly, that the acts by which the value of the property was increased not being hers, she would take her dower according to the existing value. [*Gibson v. Gibson*] . 42

2. Testator devised his real estate to trustees, with powers to "let," until all his nephews and nieces should attain twenty-one. And *after* his youngest nephew or niece should be of age, *then* he directed his estates to be sold, and the produce to go amongst all his nephews and nieces except two by name. He charged his rents with an annuity to A. and with payment of bond debts, but did not otherwise dispose of them. Held, first, the widow was put to her election; secondly, the interests of the nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. [*Parker v. Sowerby*] . . . 488

ELECTION.

See DOWER, 1 & 2.

EQUITY.

- A. being indebted to B., C., and D., three sisters, who were his near relations, partly on his own account and partly as executor of his father, executed to them a bond for 500*l*. At the time of the giving of the bond A. objected to give it,

and agreed to do so only on a verbal representation that it was not intended to be enforced unless B., C., D. should come to want, — an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death, in the hands of the survivors, and after the death of C., in the hands of D., whose property (by mutual arrangements) it was at the time of her death. On the bond was the following endorsement: "This bond is never to appear against A. Witness, C., D." This was dated eleven years after the date of the bond. It was not made clear that C.'s name was written by herself: it was that D. had written it. It was, however, proved, that if D. had written it, she did so with the authority of C. Held, that without saying whether the endorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate of D. [*Major v. Major*] . 165

EQUITABLE MORTGAGE.

Sloper, in 1833, mortgaged certain estates to Sievewright, with a power of sale, under which the property was sold in 1842 to a purchaser, who transferred his contract to Sievewright. There was a balance after paying off Sievewright, and there being accounts between Sloper and Matthews, this balance was placed, under a deed of 25th June 1842, in the hand of trustees, to be dealt with by arbitration between Sloper and Matthews. In

1834, Sloper had made an equitable mortgage of the property to Matthews. In January 1840, Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May 1843, Matthews deposited the deeds by way of mortgage with Pinckney, who now held them. In 1846, Matthews became bankrupt. Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him. Held, that as between Waldron, the plaintiff, and Pinckney, the plaintiff had, by his laches, enabled Matthews to commit a fraud, and had no equity against the defendant Pinckney. The Court also expressed an opinion that the real estate, being converted into personalty before the bankruptcy, the right of Matthews was merely a right to receive a certain sum of money, and that no notice having been given by the plaintiff or the holder of the deeds to the trustees, the right to receive the money remained in the order and disposition of Matthews, and passed to his assignees. This point did not, however, arise for express decision. [*Waldron v. Sloper*] 193

ESTATE.

Testator set out a schedule of his property, calling it 5000*l*. He then directed 1000*l*. to be invested in

each child's name, and 1000*l*. in his wife's, interest to them for their life, and afterwards to their *descendants*, except his wife's, which was at his death to be sold, and divided among them, except 200*l*. to M. T.'s child by him. Then followed in the same paper: "The above is increased by the working up of stock to 5500*l*. I wish the same division and appropriation, except that if any share falls in it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters. Held, that by the will alone the daughters would have taken absolute interests, but that by the will and codicil together they took interests which, if absolute in the first instance, were defeasible. [*Bird v. Webster*] 338

EVIDENCE.

A. left this country on the 9th November 1829. On the 16th June 1831, his brother-in-law received a letter from America on behalf of A., describing him as having changed his name to B. Three months after this, A.'s wife sent a letter to him, addressed to him as B., by the hand of a friend, who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family. Held, that on this state of facts there was not sufficient information to ground presumption of death, still less of the particular period of death. [*Re 10 & 11 Vict. c. 96, and the Trusts of the Will of G. Creed*] . . . 235

HERIOTS.

A bill was filed alleging that by the custom of the manor money pay-

ments were, and had from time immemorial been, due and payable in lieu of heriots and reliefs, that the plaintiffs were entitled to distrain, and that, by reason of confusion of boundaries, they could not distrain, but no custom of distraining was in express terms alleged. Held, on demurrer, that the bill could not be sustained; that where money payment is due in lieu of heriots and relief by the custom, there must be also a custom of distress, and the custom must be alleged positively, and not merely by inference. [*Mayor of Basingstoke v. Lord Bolton*] 270

HUSBAND AND WIFE.

1. A married woman has an equity for a settlement, however small the sum. Where a married woman was entitled to a fund of 153*l.*, her husband bankrupt, and unable to maintain her: Held, as between her and her husband's assignees, that the whole should be settled on her. [*In re Kincaid*] . . . 326
2. As between the husband's creditors and the wife, in respect of the wife's equity for a settlement, the Court will, under circumstances, give the wife more than one half; and where the wife had been at the time of the marriage, and long afterwards, in circumstances of comfort, and was reduced to distress by the husband's embarrassments, the Court gave the costs of the petitioner and of the husband's assignees out of the fund, which was 681*l.*,—400*l.* to the wife, and the remainder to the petitioner; the wife's costs out of her own fund. [10 & 11 *Vict.* c. 96, and the *Trusts of Waite's Will. Ex parte Pugh*] 202

INCLOSURE ACTS.

Under the 8 & 9 *Vict.* c. 118, the Inclosure Commissioners had made a provisional order, and were proceeding to make their final award. It was disputed whether the lands intended to be inclosed by them were within the Act. Held, that equity would not interfere to restrain them by injunction from proceeding. [*Turner v. Blamire*] 402

INFANT.

An infant's legacy of small amount paid to the father under special circumstances. [*Walsh v. Walsh*] 64

INJUNCTION.

1. A corporation having, under an Act of Parliament, right to take land for the purpose of certain public works gave notice to the owner of the inheritance of an intention to take it. They then entered regularly upon the land, for the purpose of surveys &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails and other implements on the land, and there left them, but did not commence the works or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c., to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses

- Consolidation Act. Held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the Act, and the bill was improperly filed. [*Standish v. Mayor, &c., of Liverpool*] 1
2. Where a plaintiff at law being abroad has recovered judgment in the action, and the defendant at law files his bill for an account and injunction, and obtains the common injunction, if the Court sees, on a motion to dissolve the injunction upon affidavit before answer, that there has been culpable delay on the part of plaintiff in equity, he will be ordered to pay the money recovered into Court, or the injunction will be dissolved, whether the bill was filed before or after verdict. [*Anderson v. Noble*] 143

INSPECTION OF DOCUMENTS.

A plaintiff having an order for himself, his solicitor and agents, to inspect a defendant's documents, will not be permitted to take with him another defendant to assist him in inspecting the documents. [*Bartley v. Bartley*] 233

INTEREST.

- A. being indebted to B. upon bonds, disputes arose between them as to what was due; and by an order in a suit, referring it to arbitration and an award made under that order, the debt of A. was fixed as 8000*l.*, which was ordered to be paid in two sums on days certain; and if payment was not made, the securities were to be sold, and payment made out of the proceeds. The 8000*l.* and the surplus was to

be paid to A.; no mention was made of interest. The securities were not by reason of various transactions realized for a very long time. Held, that the produce of the securities was not, as against subsequent incumbrancers of A., chargeable with more than the principal sum of 8000*l.* [*Collett v. Newnham; Owen v. Derbshire; Wade v. Newnham*] 447

INTERROGATORIES, DELIVERY OF.

- [*Bowen v. Price*] 307

ISSUE.

Principles on which a Court of equity proceeds in directing and acting upon the result of an issue to a Court of law. When the verdict is such as not to decide the question involved in the issue, this Court will not go into the evidence to decide upon it itself, the object of an issue not being merely to elicit evidence, but to obtain the assistance of the opinion of a jury, under the direction of a judge. The 79th section of the Lands Clauses Consolidation Act applies only to the jurisdiction of equity in ordering money to be paid out, and not to that of a Court of law in determining the rights of parties in an issue. [*Ex parte Freeman, &c., of Sunderland*] 184

JUDGMENT.

Money was lent upon bills of exchange at usurious interest; the lender, by way of further security, took a warrant of attorney to confess judgment, expressly stipulating that he should be at liberty to enter up judgment immediately, and he did enter up judgment within

twenty-four hours. He had previously made minute inquiries as to the amount and value of the borrower's real estate. Held, that this was a security on land within the Usury Act, and the judgment could not be enforced against the proceeds of the sale of the land. [*Lane v. Horlock*] 587

JURISDICTION.

1. A railway company were building an embankment more than five feet above the level according to the 11th and 12th sections of the Railway Clauses Consolidation Act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The Court put them on terms to take the opinion of the Board of Trade, submitting to such order as this Court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment. [*Pearce v. Wycombe Railway Company*] 244
2. A lease was granted by A. to two partners, the covenants being only joint at law. Bill filed by the representative of one of the lessees deceased, against the lessor, alleging that the lessor claimed to have a right, under the covenants, against the plaintiff, if a breach should arise, and praying merely a declaration that the defendant had no right. A demurrer to this bill was allowed, notwithstanding the 15 & 16 Vict. c. 86, s. 50. The meaning of that section is only to remove the objection that a plaintiff, who might have consequential relief, prays merely a declaration of his right. It did not mean to entitle a person to have a declaration

as to a claim which *may* be made by another, under circumstances which may or may not happen.

[*Jackson v. Turnley*] . . . 617

3. Under the 8 & 9 Vict. c. 118, the Inclosure Commissioners had made a provisional order, and were proceeding to make their final award. It was disputed whether the lands intended to be inclosed by them were within the Act. Held, that equity would not interfere to restrain them by injunction, from proceeding. [*Turner v. Blamire*] 402

LACHES.

1. A corporation having under an Act of Parliament right to take land for the purpose of certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c. to remain on the land, and from taking possession of the land until they had complied with the provisions of the Lands Clauses Consolidation Act. Held, that though the corporation were bound by the acts of their con-

tractors, the acts done were not a taking possession within the meaning of the Act, and the bill was improperly filed. [*Standish v. Mayor &c. of Liverpool*] 1

2. Sloper, in 1833, mortgaged certain real estate to Sievwright, with a power of sale, under which the property was sold in 1842, to a purchaser who transferred his contract to Sievwright. There was a balance after paying off Sievwright, and there being accounts between Sloper and Matthews, this balance was placed, under a deed of 25th June, 1842, in the hands of trustees, to be dealt with by arbitration between Sloper and Matthews. In 1834, Sloper had made an equitable mortgage of the property to Matthews. In January, 1810, Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April, 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May 1843, Matthews deposited the deeds by way of mortgage, with Pinckney, who now held them. In 1846, Matthews became bankrupt, Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him. Held, that as between Waldron the plaintiff, and Pinckney, the plaintiff had by his laches enabled Matthews to commit a fraud, and had no equity against the defendant Pinckney. [*Waldron v. Sloper*] 193

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LANDS CLAUSES CONSOLIDATION ACT.

1. The 79th section of the Lands Clauses Consolidation Act applies only to the jurisdiction of equity in ordinary money to be paid out, and not to that of a Court of law in determining the rights of parties in an issue. [*Ex parte the Freemen and Stallingers of Sunderland, Ex parte the Bishop of Durham*] 184
2. A corporation having under an Act of Parliament right to take land for the purpose of certain public works, gave notice to the owner of the inheritance, of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails, and other implements on the land, and there left them, but did not commence the works, or do any damage. This was done without obtaining the assent of the plaintiff, but it became known to his agent in the end of December. In the beginning of the following February, without any previous communication with the defendants, he filed his bill for an injunction to restrain them from allowing the waggons, &c. to remain on the land, and from taking possession of the land, until they had complied with the provisions of the Lands Clauses Consolidation Act. Held, that though the corporation were bound by the acts of their contractors, the acts done were not a taking possession within the meaning of the Act, and the bill was impro-

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perly filed. [*Standish v. Mayor, &c. of Liverpool*] 1

LAPSE OF TIME.

A renewable leasehold for lives was vested in A. in trust for B. for life, with remainders in the events that happened to C. and his heirs. Afterwards, on the marriage of B., a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B. for life, remainder to the sons of that marriage in tail under which D. would be entitled. The lease being still subsisting in A., B. took a renewal in his own name, without noticing the trust, and after the death of B., D. entered and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under C. D. on his marriage assigned the leasehold to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed on the construction of which the doubts arose took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds. Held, firstly, that assuming the possession of D. and those claiming under him to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of

Limitations, and might set up the Statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement by D., could as purchasers set up the statute. [*Petre v. Petre*] 371

LEGACY.

1. A testatrix directed a sum which she said she owed to A. and B, on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being, of such school, *now or hereafter to be built.*" The testatrix did not in fact owe the money to A. and B., but intended it to be held by them on a secret trust for the use of the existing chapel. She did not tell them of this in her lifetime, but told her executor; and A. and B. never knew of the intention till after the testatrix's death. Held, on the question of the validity of the residuary gift, that it was not good even as to the personal estate, as it would be a due execution of the trust to devote the money to building a school-house. [*Longstaff v. Rennison*] 28
2. A testator gave to his sons certain real estates, with power to appoint to any woman they might respectively marry, a jointure in bar of dower. Held, that an appointment under this power was a gift within the 45th Geo. III. c. 28, and liable to legacy duty. [*Sweeting v. Sweeting*] 331
3. An infant's legacy of small amount paid to the father under special circumstances. [*Walsh v. Walsh*]

LEGACY DUTY.

See LEGACY, 2.

LIMITATION OF TRUSTS.

A renewable leasehold for lives was vested in A. in trust for B. for life, with remainders in the events that happened to C. and his heirs. Afterwards, on the marriage of B., a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B. for life, remainder to the sons of that marriage in tail, under which D. would be entitled. The lease being still subsisting in A., B. took a renewal in his own name, without noticing the trust, and after the death of B., D. entered, and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under C. D. on his marriage, assigned the leasehold to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds. Held, firstly, that assuming the possession of D. and those claiming under him to have been originally wrongful, he and they were not express trustees within the twenty-fifth sec-

tion of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement by D. could, as purchasers, set up the statute. [*Petre v. Petre*] . 371

MASTER'S ABOLITION ACT.

The forty-second section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80) does not authorize the Court to delegate to the Master the power of calling in scientific aid. But where, before the Act, a complicated claim for a debt requiring such aid had been referred to the Master, and liberty had been given to the claimant to bring an action, as it appeared that such action, if brought, must go to arbitration, the Court ordered the matter to be disposed of in chambers, where the judge would call in such scientific aid as he should think fit. [*Mildmay v. Lord Methuen*] . . 216

MORTMAIN.

A testatrix directed a sum which she said she owed to A. and B., on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being of such school, *now or hereafter to be built*." The testatrix did not in fact owe the money to A. and B., but intended it to be held by them on a secret trust for the use of the existing chapel. She did not tell them of this in her lifetime, but told her executor; and A. and B. never knew of

the intention till after the testatrix's death. Held, on the question of the validity of the residuary gift, that it was not good even as to the personal estate, as it would be a due execution of the trust to devote the money to building a school-house. [*Longstaff v. Rennison*] 28

NUISANCE.

A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade, which destroyed her rest and depreciated the value of her property. The evidence as to the nuisance was conflicting, and no action had been brought. Held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages, and there could be no injunction till the right was established at law. And *semble*, that in respect of the mere personal nuisance, the wife could not sue alone, and that, as to mere depreciation of her property, she could not maintain a bill, as that would not amount to a nuisance. [*White v. Cohen*] 312

OFFICIAL MANAGER.

Rule as to costs of an official manager appealing without sufficient ground. [*In the Matter of the Winding-up Acts 1848 and 1849, and of the Wolverhampton, Chester, and Birkenhead Junction Railway Company, Ex parte Roberts*] 204

ORDERS.

1. The 67th and 68th Orders of 1845, apply to an application to the Court, as well as to an application to the Master. A motion for leave to amend, by striking out the name

of a plaintiff and making him a defendant, must be supported by the affidavits required by the 67th and 68th Orders of 1845. [*McLeod v. Lyttleton*] . . . 36

2. In a cause at issue before the Orders of 7th August 1852, the parties in July 1852 agreed to postpone publication till the 2nd November, on the ground that the new practice would then come into operation. The case was one in which it was not clear, but *probable*, that oral examination might be the most effective. Held, that the postponement of publication was not an agreement to adopt the new practice, but in the absence of special reasons to the contrary, there being a *probability* of advantage in applying the new practice, it ought, according to the intention of the Act, to be applied. [*Howard v. Howard*] 239

ORDER AND DISPOSITION.

Sloper, in 1833, mortgaged certain real estate to Sievewright, with a power of sale, under which the property was sold in 1842 to a purchaser who transferred his contract to Sievewright. There was a balance after paying off Sievewright, and there being accounts between Sloper and Matthews, this balance was placed under a deed of 25th June 1842, in the hands of trustees, to be dealt with by arbitration between Sloper and Matthews. In 1834, Sloper had made an equitable mortgage of the property to Matthews. In January, 1840, Matthews deposited these deeds with Waldron the plaintiff, by way of equitable mortgage. In April 1842, Matthews applied to the plaintiff for the loan of the deeds, telling

him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May 1843, Matthews deposited the deeds, by way of mortgage, with Pinckney, who now held them. In 1846, Matthews became bankrupt. Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him. The Court expressed an opinion that the real estate being converted into personalty before the bankruptcy, the right of Matthews was merely a right to receive a certain sum of money, and that, no notice having been given by the plaintiff or the holder of the deeds to the trustees, the right to receive the money remained in the order and disposition of Matthews, and passed to his assignees. This point did not, however, arise for express decision. [*Waldron v. Sloper*] 193

PARTIES.

1. A bill by one member of a company on behalf of himself and all others, except the defendants, prayed an account of the receipts and payments of the defendants on behalf of the company, and the payment of what should be found due to the plaintiff. It appeared that there were circumstances which made the interest of some of the persons purporting to be represented by the plaintiff different from his. Held, that this case was within the 49th section of the 15 & 16 Vict. c. 86; and the Court could treat the absent plaintiffs as defendants, and determine

whether a decree should be made; and accordingly decreed an account, giving liberty to certain shareholders to attend the proceedings in chambers. [*Clements v. Bowes and others*] 684

2. A bill was filed against A. and others, to set aside a deed of assignment by the plaintiff, to some of the defendants, for fraud. The answer stated a subsequent deed by which the plaintiff had assigned all her interest in the property to B., C. and D., in trust for creditors, and submitted that they ought to be parties. The plaintiff made them parties by amendment, alleging, but not proving, that they were out of the jurisdiction, in Scotland, and brought on the cause to a hearing without bringing them before the Court. Held, that the plaintiff having made them parties, they ought to be before the Court, if not out of the jurisdiction; and as to their being out of the jurisdiction, if they were so in fact, being only in Scotland, the plaintiff ought to have served them. [*Moodie v. Bannister*] 514

PERSONAL REPRESENTATIVE.

The 44th section of the 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the Court. A. died in a colony, and made colonial representatives, and bequeathed his residue to B., who afterwards died. B.'s representative received from A.'s colonial representatives his residue. The representative of B. was also a creditor of A. Held, that in a creditor's suit, the representative of B. could not be compelled to

bring into Court the money so paid to him by A.'s colonial representatives. [*Silver v. Stein*] . . . 295

PIRACY.

The first edition of a work of compilation was published before the 5 & 6 Vict. c. 45 ; several editions of it were published after this Act and not registered. Held, that as to so much of the matter contained in the original edition as was contained in the subsequent ones, the owner might sue although those subsequent editions were not registered, but as to the new matter the subsequent editions were books which ought to be registered, and the owner could not sue for infringement on that point. If a foreigner translates an English work, and then an Englishman retranslates that foreign work into English, that would be an infringement of the original copyright. Grounds on which fairness or unfairness in the use of a previous work is to be determined. [*Murray v. Bogue*] 353

PLEADING.

1. A bill alleged the plaintiff to be entitled under wills which it set out, as tenant in tail ; it alleged that the defendants claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure construction of these wills. The bill also alleged the plaintiff's pedigree as tenant in tail. The answer ignored the pedigree but admitted the possession of documents tending to evidence that pedigree. Held, that the plaintiff was entitled to production of them. A bill alleged that A. left B. his niece and C. his *great nephew* his co-heirs, who thereupon became the right heirs and issue in tail of D.

Held, that this was a sufficiently certain allegation of the title of B. and C., as such co-heirs and issue in tail, claiming through A. [*Wright v. Vernon*] 344

2. A bill by one member of a company on behalf of himself and all others except the defendants, prayed an account of the receipts and payments of the defendants on behalf of the company, and the payment of what should be found due to the plaintiff. It appeared that there were circumstances which made the interest of some of the persons purporting to be represented by the plaintiff different from his. Held, that this case was within the 49th sect. of the 15 & 16 Vict. c. 86, and the Court could treat the absent plaintiffs as defendants, and determine whether a decree should be made, and accordingly the Court decreed an account giving liberty to certain shareholders to attend the proceedings in chambers. [*Clements v. Bowes and others*] 684

3. A lease was granted by A. to two partners, the covenants being only joint at law. Bill filed by the representative of one of the lessees deceased against the lessor, alleging that the lessor claimed to have a right under the covenants against the plaintiff, if a breach should arise, and praying merely a declaration that the defendant had no right. A demurrer to this bill was allowed notwithstanding the 15 & 16 Vict. c. 86. s. 50. The meaning of that section is only to remove the objection that a plaintiff who might have consequential relief, prays merely a declaration of his right. It did not mean to entitle a person to have a declaration as to a claim which *may* be made by another under circumstances which may or may

- not happen. [*Jackson v. Turnley*] 617
4. A bill was filed against A. and others, to set aside a deed of assignment by the plaintiff to some of the defendants, for fraud. The answer stated a subsequent deed, by which the plaintiff had assigned all her interest in the property to B., C., and D., in trust for creditors, and submitted that they ought to be parties. The plaintiff made them parties by amendment, alleging, but not proving, that they were out of the jurisdiction, in Scotland, and brought on the cause to a hearing, without bringing them before the Court. Held, that the plaintiff having made these parties, they ought to be before the Court, if not out of the jurisdiction; and as to their being out of the jurisdiction, if they were so in fact, being only in Scotland, the plaintiff ought to have served them.] *Moodie v. Bannister*] 514
5. A bill was filed by A. and his wife, alleging title in respect of the wife's estate tail. The defendant demurred for want of equity. While the demurrer was standing for argument, the wife died, and then A. filed a supplemental bill, alleging a disentailing deed before the date of the original bill under which deed A. claimed in fee. Held, that in this state of things the demurrer could not be heard; that such an alteration of the record was not properly the subject of either supplemental bill, or of original bill in the nature of a supplemental bill, or of a bill of revivor, nor properly of amendment; but the original bill ought to have been left to take its course, and a new bill filed stating the real title. [*Wright v. Vernon*] . . . 68
6. A bill was filed, alleging that, by the custom of the manor money payments were, and had from time immemorial been due and payable in lieu of heriots and reliefs; that the plaintiffs were entitled to distrain, and that by reason of confusion of boundaries they could not distrain, but no custom of distraining was in express terms alleged. Held, on demurrer, that the bill could not be sustained; that where money payment is due in lieu of heriots and relief by the custom, there must be also a custom of distress, and the custom must be alleged positively, and not merely by inference. [*Mayor of Basingstoke v. Lord Bolton*] 270
7. A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade which destroyed her rest and depreciated the value of her property. The evidence as to the nuisance was conflicting, and no action had been brought. Held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages, and there could be no injunction till the right was established at law. And *semble*, that in respect of the mere personal nuisance the wife could not sue alone, and that, as to mere depreciation of her property, she could not maintain a bill, as that would not amount to nuisance. [*White v. Cohen*] 312

POWERS.

1. A. had a general power of appointment by deed or will. She made an appointment by deed, reserving power to revoke and to make any new appointment by deed. She repeated this process twice, and then by a deed-poll she revoked

- the preceding appointment, but made no new appointment. Afterwards, by will she purported to appoint on trust to sell. Held, that the first deed exhausted and destroyed the original power; and no new appointment being made by the deed-poll, and no new power of appointment by will having been reserved, there was no power to appoint by will, and the appointment on trust to sell was bad. [*Evans v. Saunders*] 415
2. General propositions concerning the nature, exercise, and exhaustion of a general power to appoint by deed or will, and concerning powers of revocation and new appointment. [*Evans v. Evans*] 654
3. A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities, 7000*l.* £3 per Cent. Reduced, and 3150*l.* New £4 per Cents.; also certain shares in a company, and 54,000 French rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife, for her separate use, subject thereto for the husband and wife for their joint lives; if the wife should predecease her husband, then, on trust to raise 3000*l.*, over which a general power of appointment was given to the wife, and as to the rest, after the death of the wife so predeceasing her husband, for him for life, and after his death in trust for all *and every or such one or more exclusively of the other or others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money and future, or executory, or other trusts being for the benefit of the said relations in blood of the said Sarah Harvey within the degree aforesaid (or some one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of, or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by two or more credible witnesses, direct or appoint, and in default of such direction or appointment, and so far as any such direction or appointment should not extend, in trust for such person or persons as, under the statute for the Distribution of the Effects of Intestates would, at the decease of the said Sarah Harvey have become entitled thereto as her next of kin, in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof, his widow, and intestate. The settlement also comprised certain plate, linen, china, &c., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, &c.; and as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said:—"I do, by virtue of the power and authority reserved to me in and by the deed of settlement,*

made, &c., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death, she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows:—"And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Hervey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the

residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security, during the respective lives of my said nieces; and the dividends or interest on each share, as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally, share and share alike; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and be-

queath the same, and, in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates." Held, first, that the will was an execution of all the powers to appoint each portion of property comprised in the settlement. Secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio*, because it might comprise persons not living at the death of the testatrix and within the eighth degree, nor did it become void *in toto*, because it did in fact, at the time of distribution, include such persons, but that it was good *pro tanto*. Thirdly, that the attempted limitation to the husbands of the nieces was bad, as they were strangers; and the limitations to their children, grandchildren, or other relations in blood, was void for remoteness. Fourthly, that the attempt to cut down the estate given to the nieces in the first instance failing, the attempted remainders over did not go as unappointed to the next of kin, but failed wholly, and left absolute interests subsisting in the nieces. [*Harvey v. Stracey*] . . . 73

4. Testator gave property to his trustees, upon trust to pay, distribute, and divide equally between his daughters, naming them, to be paid and assured to them as they should attain the age of twenty-one, or be married under that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same. There was a power of maintenance, and gifts over as

between the daughters on dying unmarried under twenty-one, and if all the daughters should die under twenty-one unmarried, and without leaving issue, then over. Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent. [*Taylor v. Austen*] . . . 459

PRACTICE.

1. The 67th and 68th Orders of 1845, apply to an application to the Court, as well as to an application to the Master. A motion for leave to amend, by striking out the name of a plaintiff and making him a defendant, must be supported by the affidavits required by the 67th and 68th Orders of 1845. [*M'Leod v. Lyttleton*] 36
2. A. was a transferee of a mortgage for 4000*l.*, and claimed also under a judgment 880*l.* A bill was filed by a subsequent mortgagee to redeem the mortgage for 4000*l.*, and for payment of the plaintiff's incumbrance in priority over the judgment debt. The bill alleged that A. had in his possession a deed of conveyance of the estate in which was a recital that the judgment debt had been paid off. A. admitted the possession of the deed and set out a portion of it, by which it was recited that the judgment debt was paid off, but he said that in fact this was only done for the purpose of clearing the estate, and that he had taken an assignment of the debt. Held, that if he had not been a mortgagee he must have produced the deed; and 4000*l.* having been paid to him without prejudice to any question in the cause, held that he could not set off 880*l.* of that as due to the

- judgment debt, but must be taken to be paid off as mortgagee, and therefore liable to produce the deed [*Cannock v. Jauncey*] . 497
3. Under an order of the Court, made in a suit in which it was held that a judgment was a charge on an ecclesiastical benefice, a receiver was in possession of the funds of the benefice, for the benefit of the plaintiff, subject to a due provision for the service of the church. A subsequent incumbrancer, with notice of the appointment of the receiver, issued a sequestration, and proceeded up to publication, but did not take or receive any funds of the living. Held, that this ought not to have been done without the leave of the Court; that it was an interference with the possession of the receiver, and was a contempt. [*Hawkins v. Gathercole*; *Hawkins v. Carrack*] 12
4. As between the husband's creditors and the wife, in respect of the wife's equity for a settlement, the Court will, under circumstances, give the wife more than one-half; and where the wife had been at the time of the marriage and long afterwards, in circumstances of comfort, and was reduced to distress by the husband's embarrassments, the Court gave the costs of the petitioner and of the husband's assignees out of the fund, which was 681*l.*—400*l.* to the wife, and the remainder to the petitioner; the wife's costs out of her own fund. [*The 10 & 11 Vict. c. 96, and the Trusts of Waite's Will, Ex parte Pugh*] 202
5. The Court has no power to order a sale under the 48th section of the Chancery Improvement Act on interlocutory application, but only where before the Act foreclosure might have been decreed. [*Wayn v. Lewis*] . 487
6. On a bill to set aside a deed, filed by one plaintiff only, praying that, if necessary, it might be taken as on behalf of creditors generally, it appeared that A., claiming under the deed, had a power of appointment, and that she had appointed under her power; the plaintiff moved for production of documents in the hands of the trustee of the deed, offering to confirm the appointment of A. The appointees were not parties. Held, that the production could not be enforced in the absence of those persons. [*Ford v. Dolphin*] 222
7. The 42nd section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80), does not authorize the Court to delegate to the Master the power of calling in scientific aid. But where, before the Act, a complicated claim for a debt requiring such aid had been referred to the Master, and liberty had been given to the claimant to bring an action, and it appeared that such action, if brought, must go to arbitration, the Court ordered the matter to be disposed of in chambers, where the judge would call in such scientific aid as he should think fit. [*Mildmay v. Lord Methuen*] 216
8. Where a plaintiff at law being abroad, has recovered judgment in the action, and the defendant at law files his bill for an account and injunction, and obtains the common injunction, if the Court sees, on a motion to dissolve the injunction upon affidavit before answer, that there has been culpable delay on the part of the plaintiff in equity, he will be ordered to pay the money recovered into Court, or

- the injunction will be dissolved, whether the bill was filed before or after verdict. [*Anderson v. Noble*] 143
9. The 44th section of 15 & 16 Vict. c. 86, does not apply to paying money out of Court. [*Rawlins v. M' Mahon*] 225
10. In a cause at issue before the Orders of 7th August, 1852, the parties, in July 1852, agreed to postpone publication till the 2nd November, on the ground that the new practice would then come into operation. The case was one in which it was not clear, but *probable*, that oral examination might be the most effective. Held, that the postponement of publication was not an agreement to adopt the new practice, but, in the absence of special reasons to the contrary, there being a *probability* of advantage in applying the new practice, it ought, according to the intention of the Act, to be applied. [*Howard v. Howard*] . . . 239
11. The birth of one of a class entitled as such after the institution of a suit is within the fifty-second section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree. [*Fullerton v. Martin*] . . . 238
12. A plaintiff having an order for himself, his solicitors, and agents, to inspect a defendant's documents, will not be permitted to take with him another defendant to assist him in inspecting the documents. [*Bartley v. Bartley*] . . . 233
13. Motion for production of documents belonging to a company, against defendants who had been, but were no longer, trustees of the company, no other shareholders being parties. The answer admitted the documents to be in the office of the company but not otherwise in the possession or custody of the defendants. Held, that production could not be enforced. [*Penney v. Goode*] 474
14. A married woman, having a life interest to her separate use, in real estate with her husband, cut timber. A suit was instituted in one branch of the Court, to carry into effect the trusts of the settlement. In another branch, a suit was in existence, in which a claim was made on the married woman's separate use in respect of the timber cut. Held, that in the first suit the Court could not decide the question as to the right to cut the timber, but the married woman securing the value of the timber cut, was allowed her income pending the suit. [*Stacey v. Southey*] 400
15. The 18th section of the Chancery Amendment Act does not entitle a plaintiff to read an affidavit on a motion to produce documents to establish the possession of documents not specifically admitted by the answer to be in the defendant's possession. [*Lamb v. Orton*] 414
16. The 44th section of the 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the Court. A died in a colony, and made colonial representatives, and bequeathed his residue to B., who afterwards died. B.'s representative received from A's colonial representatives his residue. The representative of B. was also a creditor of A. Held, that in a creditor's suit, the representative of B. could not be compelled to bring into Court the money so paid to him by A's

- colonial representatives. [*Silver v. Stein*] 295
17. A bill alleged the plaintiff to be entitled, under wills which it set out, as tenant in tail; it alleged that the defendants claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure construction of these wills. The bill also alleged the plaintiff's pedigree as tenant in tail. The answer ignored the pedigree, but admitted the possession of documents tending to evidence that pedigree. Held, that the plaintiff was entitled to production of them. A bill alleged that A. left B., his *niece*, and C., his *great nephew*, his co-heirs, who thereupon became the right heirs and issue in tail of D. Held, that this was a sufficiently certain allegation of the title of B. and C. as such co-heirs and issue in tail claiming through A. [*Wright v. Vernon*] 344

PRECATORY WORDS.

Testator by his will gave certain shares of freehold and leasehold houses to his wife, *for her sole use and benefit*, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He gave her all his monies in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath *what should be remaining*, in such sums as she should think proper, unto such members of her own and his family that she should think most deserving, and were entitled to the

same. He made a codicil by which he gave in terms his residuary estate to his wife. Held, that both as to the freehold and leasehold property and the monies, there was no trust; but the wife took absolutely. [*Green v. Marsden*] 646

PRESUMPTION.

- A. left this country on the 9th of November, 1829. On the 16th of June, 1831, his brother-in-law received a letter from America on behalf of A., describing him as having changed his name to B.; three months after this A.'s wife sent a letter to him, addressed to him as B., by the hand of a friend, who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family. Held, that on this state of facts, there was not sufficient information to ground presumption of death, still less of the particular period of death. [*Re 10 & 11 Vict. c. 96, and the Trusts of the Will of G. Creed*] 235

PRINCIPAL AND SURETY.

- A., B., and C. contracted with a company to execute certain works on given terms; D. and E. gave a bond, as their sureties, for the performance of the contract. A. & B. retired from the partnership, and F. was substituted. Afterwards disputes arose between the company and C. and F. as to the conduct of the works, and various transactions took place by which the terms of the contract were varied, and during which the company paid to C. and F. certain monies which it had been agreed originally should be paid to A., B., and C.—D. and E., the sureties, were no parties to these

transactions, and gave no express consent, but they had been the solicitors of A., B., and C. in the original contract; knew of all of the subsequent transactions, and acted as the solicitors of C. and F., and, as such solicitors, prepared many of the documents required for such transactions. The company having brought an action on the bond against the sureties for breach of the contract, they filed this bill to restrain the action. Held, that the sureties were not discharged, and that the action could not be stopped. [*Woodcock v. Oxford and Worcester Railway Company*] . 521

PRIVITY.

Sloper, in 1833, mortgaged certain real estate to Sievewright, with a power of sale, under which the property was sold in 1842 to a purchaser, who transferred his contract to Sievewright. There was a balance after paying off Sievewright, and there being accounts between Sloper and Matthews, this balance was placed, under a deed of 25th of June, 1842, in the hands trustees to be dealt with by arbitration between Sloper and Matthews. In 1834, Sloper had made an equitable mortgage of the property to Matthews. In January, 1840, Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April, 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable the purchase to be completed, and promising to return them forthwith. He did not return them forthwith, and the plaintiff never applied to have the deeds back for more than four years. In May, 1848, Matthews deposited

the deeds, by way of mortgage, with Pinckney, who now held them. In 1846, Matthews became bankrupt; Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deeds of 1842 paid to him. Held, that, as between Waldron, the plaintiff, and Pinckney, the plaintiff had, by his laches, enabled Matthews to commit a fraud, and had no equity against the defendant Pinckney. [*Waldron v. Sloper*] . . . 193

PRIVILEGED COMMUNICATIONS.

Where it is sworn that documents are confidential communications relating to the particular suit, or to another suit, which, though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. [*Thompson v. Falk*] 21

PRODUCTION OF DOCUMENTS.

1. A bill alleged the plaintiff to be entitled, under wills which it set out, as tenant in tail; it alleged that the defendants claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure construction of these wills. The bill also alleged the plaintiff's pedigree as tenant in tail. The answer ignored the pedigree, but admitted the possession of documents tending to evidence that pedigree. Held, that the plaintiff was entitled to production of them. A bill alleged that A. left B., his niece, and C., his great nephew, his co-heirs who thereupon became the right heirs and issue in

- tail of D. Held, that this was a sufficiently certain allegation of the title of B. and C. as such co-heirs and issue in tail claiming through A. [*Wright v. Vernon*] . . . 344
2. Motion for production of documents belonging to a company, against defendants, who had been, but were no longer, trustees of the company, no other shareholders being parties. The answer admitted the documents to be in the office of the company, but not otherwise in the possession or custody of the defendants. Held, that production could not be enforced. [*Penney v. Goode*] . . . 474
3. A. was a transferee of a mortgage for 4000*l.*, and claimed also under a judgment 850*l.* A bill was filed by a subsequent mortgagee to redeem the mortgage for 4000*l.* and for payment of the plaintiff's incumbrance in priority over the judgment debt. The bill alleged that A. had in his possession a deed of conveyance of the estate, in which was a recital that the judgment debt had been paid off. A. admitted the possession of the deed and set out a portion of it, by which it was recited that the judgment debt was paid off, but he said that in fact this was only done for the purpose of clearing the estate, and that he had taken an assignment of the debt. Held, that if he had not been a mortgagee he must have produced the deed; and 4000*l.* having been paid to him without prejudice to any question on the cause; held, that he could not set off 850*l.* of that as due to the judgment debt, but must be taken to be paid off as mortgagee, and therefore liable to produce the deed. [*Cannock v. Jauncey*] . . . 497
4. On a bill to set aside a deed filed by one plaintiff only, praying that, if necessary, it might be taken as on behalf of creditors generally, it appeared that A. claiming under the deed had a power of appointment; and that she had appointed under her power; the plaintiff moved for production of documents in the hands of the trustee of the deed, offering to confirm the appointment of A. The appointees were not parties. Held, that the production could not be enforced in the absence of those persons. [*Ford v. Dolphin*] . . . 222
5. The 18th section of the Chancery Amendment Act does not entitle a plaintiff to read an affidavit on a motion to produce documents to establish the possession of documents not specifically admitted by the answer to be in the defendant's possession. [*Lamb v. Orton*] . . . 414
- ### RAILWAY CLAUSES CONSOLIDATION ACT.
- A railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the Railway Clauses Consolidation Act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The Court put them on terms to take the opinion of the Board of Trade, submitting to such order as this Court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment. [*Pearce v. Wycombe Railway Company*] . . . 244
- ### RECTIFYING DEEDS.
- A., being the holder of several policies of insurance on the life of B.,

and being unable to keep them up, entered into an agreement with C., for the purpose of C. keeping them up. The agreement consisted of three instruments: first, a letter, by which it was stated that C. was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond, and an equitable mortgage of certain estates. No time was specified for the repayment of the advances and interest. Secondly, a bond for 6000*l.*, referring to the letter for repaying the advances and interest *at the expiration of six months from the death of B.* Thirdly, an agreement, also referring to the letter and to the deposit of the policies to secure the payment of the advances and interest *at the expiration of six calendar months from the death of B.*, by which agreement the advances and interest were secured to be paid at six months after the death of B., upon certain estates. A. died, living B., leaving a considerable amount of advances and interest unpaid, and having before his death assigned the policies to trustees, for his creditors. C. now filed his bill, claiming to have all his advances and interest paid, and that the agreement might be varied, and made to conform to the letter, and that, if necessary, the policies might be sold. Held, that the agreement could not be rectified, there being nothing to rectify it by, except the letter itself, the letter and agreement being incorporated in effect into one instrument, and the letter not specifically pointing out the time when the security was to be available. [*Brougham v. Squire*] 151

RECEIVER.

Under an order of the Court made in a suit in which it was held that a judgment was a charge on an ecclesiastical benefice, a receiver was in possession of the funds of the benefice for the benefit of the plaintiff, subject to a due provision for the service of the church. A subsequent incumbrancer, with notice of the appointment of the receiver, issued a sequestration, and proceeded up to publication, but did not take or receive any funds of the living. Held, that this ought not to have been done without the leave of the Court; that it was an interference with the possession of the receiver, and was a contempt. [*Hawkins v. Gathercole*; *Hawkins v. Carrack*] 12

REGISTRATION.

The first edition of a work of compilation was published before the 5 & 6 Vict. c. 45; several editions of it were published after this Act, and not registered. Held, that as to so much of the matter contained in the original edition as was contained in the subsequent ones the owner might sue, although those subsequent editions were not registered; but as to the new matter, the subsequent editions were books which ought to be registered, and the owner could not sue for infringement on that point. If a foreigner translates an English work, and then an Englishman re-translates that foreign work into English, that would be an infringement of the original copyright: grounds on which fairness or unfairness in the use of a previous work is to be determined. [*Murray v. Bogue*] 353

RELEASE.

A trustee paying the trust money in strict accordance with the tenor of the trusts is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts. Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life and remaindermen called for payment: Held, that the trustee might lawfully insist on a release under seal. [*King v. Mullins*] . . . 308

RELIEF.

A bill was filed alleging that by the custom of the manor, money-payments were and had from time immemorial been due and payable in lieu of heriots and reliefs, that the plaintiffs were entitled to distrain, and that by reason of confusion of boundaries they could not distrain, but no custom of distraining was in express terms alleged. Held, on demurrer, that the bill could not be sustained; that where money-payment is due in lieu of heriots and relief by the custom, there must be also a custom of distress, and the custom must be alleged positively and not merely by inference. [*Mayor of Basingstoke v. Lord Bolton*] 270

REMAINDERMAN.

A testator devises real estate, subject to a lease for a term of years at 25*l.* 10*s.* rent, to A. for life, remainder to B. A railway company purchases the interest of A. and B., subject to the lease, for 1700*l.*, which is invested. The lease was granted at the said rent (less than

a rack-rent) in consideration of a covenant to expend money, 600*l.*, on the estate during twenty years. Held, that the tenant for life was entitled to the whole of the dividends of the purchase-money. [*Re Steward's Estate, Ex parte Briscoe*] . . . 636

REMOTENESS.

A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities; 7000*l.* 3*l.* per Cent. Reduced; and 3150*l.* New 4*l.* per Cents; also certain shares in a Company; and 54,000*l.* French rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife, for her separate use, subject thereto for the husband and wife for their joint lives; if the wife should pre-decease her husband, then on trust to raise 3000*l.*, over which a general power of appointment was given to the wife; and as to the rest, after the death of the wife so pre-deceasing her husband, for him for life, and after his death in trust for all and every or such one or more exclusively of the other or others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money, and future, or executory, or other trusts (such annual sums of money, and future, or executory, or other trusts, being for the benefit of the said relations in blood of the said Sarah Harvey within the degree aforesaid, or some or one of them), and in such manner as the said Sarah Harvey should, notwithstanding

ing her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of and to be attested by two or more credible witnesses, direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, in trust for such person or persons as, under the Statute for the Distribution of the Effects of Intestates, would, at the decease of the said Sarah Harvey, have become entitled thereto as her next of kin, in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof his widow, and intestate. The settlement also comprised certain plate, linen, china, &c., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, &c.; and as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said: "I do, by virtue of the power and authority reserved to me in and by the deed of settlement, made, &c., hereby make, publish, and declare this my last will and testament, in manner and form following, that is to say." She then referred particularly to the power to dispose of 3000*l.*, and made a disposition of a great part of it. She gave to her husband

for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows: "And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies, and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Harvey, the said Charles Day and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security, during the respective lives of my said nieces; and the dividends or interest on each share, as the same

shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead, equally, share and share alike; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner, and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same; and in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates." Held, that the attempted limitation to the husbands of the nieces was bad, as they were strangers; and the limitations to

their children, grandchildren, or other relations in blood, were void for remoteness. [*Harvey v. Stracey*] . . . 73

REPAIRS.

A testator gave all his residuary real estate, and his stock, mortgages, and securities for money, and all other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which, at the time of his death, he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense. Held, that the widow was entitled to the leaseholds in specie; secondly, that the repairs were to be borne by the residue, and not by the tenant for life. [*Harris v. Poyner*] . . . 174

REVOCATION.

General propositions concerning the nature, exercise, and exhaustion of a general power to appoint by deed or will, and concerning powers of revocation and new appointment. [*Evans v. Evans*] . . . 654

RIGHT OF FOLLOWING ASSETS.

The 44th section of the 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the Court. A. died in a colony,

and made colonial representatives, and bequeathed his residue to B., who afterwards died. B.'s representative received from A.'s colonial representatives his residue. The representative of B. was also a creditor of A. Held, that in a creditor's suit the representative of B. could not be compelled to bring into Court the money so paid to him by A.'s colonial representatives [*Silver v. Stein*] . . . 295

RIGHT TO SUE.

A bill was filed by a married woman in respect of her separate property, alleging a nuisance by reason of a noisy trade, which destroyed her rest and depreciated the value of her property. The evidence as to the nuisance was conflicting, and no action had been brought. Held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages, and there could be no injunction till the right was established by law. And *semble*, that in respect of the mere personal nuisance the wife could not sue alone; and that as to mere depreciation of her property, she could not maintain a bill, as that would not amount to nuisance. [*White v. Cohen*] . . . 312

SALE.

The Court has no power to order a sale under the 48th section of the Chancery Improvement Act, on interlocutory application, but only where, before the Act, foreclosure might have been decreed. [*Wayn v. Lewis*] . . . 487

SECURITY ON LAND.

Money was lent upon bills of ex-

change at usurious interest; the lender, by way of further security, took a warrant of attorney to confess judgment, expressly stipulating that he should be at liberty to enter up judgment immediately; and he did enter up judgment within twenty-four hours. He had previously made minute inquiries as to the amount and value of the borrower's real estate. Held, that this was a security on land within the Usury Act, and the judgment could not be enforced against the proceeds of the sale of the land. [*Lane v. Horlock*] . . . 587

SEQUESTRATION.

Under an order of the Court, made in a suit in which it was held that a judgment was a charge on an ecclesiastical benefice, a receiver was in possession of the funds of the benefice, for the benefit of the plaintiff, subject to a due provision for the service of the Church. A subsequent incumbrancer, with notice of the appointment of the receiver, issued a sequestration, and proceeded up to publication, but did not take or receive any funds of the living. Held, that this ought not to have been done without the leave of the Court; that it was an interference with the possession of the receiver, and was a contempt. [*Hawkins v. Gathercole; Hawkins v. Carrack*] . . . 12

SETTLEMENT.

A married woman has an equity for a settlement, however small the sum. Where a married woman was entitled to a fund of 153*l.*, her husband bankrupt, and unable to maintain her: Held, as between

- her and her husband's assignees, that the whole should be settled on her. [*In re Kincaid*] . . . 326

SOLICITOR AND CLIENT.

Where it is sworn that documents are confidential communications, relating to the particular suit, or to another suit, which, though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. [*Thompson v. Falk*] 21

SPECIALTY DEBT.

A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient. A creditor by bond, in which the heirs are named, takes priority over a specialty creditor under a security in which the heirs are not expressly named. [*Richardson v. Jenkins*] 477

SPECIFIC PERFORMANCE.

A. and B., trustees of a stock fund in trust for A. for life, with remainder over to unascertained persons, sold out part of the stock, and lent it to B., who misapplied it. B. gave to A., by way of security, and indemnifying her, an equitable mortgage by deposit. B. then became bankrupt, and A. and B.'s assignees applied to and obtained from the

Court of Bankruptcy, on a statement of these facts, but without making the *cestuis que trust* of the fund parties, an order for sale. They sold, with a special condition referring to the petition and order in bankruptcy, that the purchaser should only have the receipt and conveyance of A. and the assignees. Held, that A. and the assignees could make a good title without the concurrence of the *cestuis que trust* in the receipt or conveyance. [*Groom v. Booth*] 548

STATUTES.

1. A railway company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the Railway Clauses Consolidation Act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The Court put them on terms to take the opinion of the Board of Trade, submitting to such order as this Court should thereafter make, otherwise an injunction would go to restrain the company from proceeding with the embankment. [*Pearce v. Wycombe Railway Company*] 244
2. The 42nd section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80) does not authorize the Court to delegate to the Master the power of calling in scientific aid. But where before the Act a complicated claim for a debt requiring such aid had been referred to the Master, and liberty had been given to the claimant to bring an action; as it appeared that such action, if brought, must go to arbitration, the Court ordered the matter to be disposed of in

- chambers, where the Judge would call in such scientific aid as he should think fit. [*Mildmay v. Lord Methuen*] 216
3. Principles on which a Court of equity proceeds in directing and acting upon the result of an issue to a Court of law. When the verdict is such as not to decide the question involved in the issue, this Court will not go into the evidence to decide upon it itself, the object of an issue not being merely to elicit evidence, but to obtain the assistance of the opinion of a jury, under the direction of a judge. The 79th section of the Lands Clauses Consolidation Act applies only to the jurisdiction of equity in ordering money to be paid out, and not to that of a Court of law in determining the rights of parties in an issue. [*Ex parte The Freeman and Stallingers of Sunderland, Ex parte The Bishop of Durham*] 184
4. A testator gave to his sons certain real estates, with power to appoint to any woman they might respectively marry, a jointure in bar of dower. Held, that an appointment under this power was a gift within the 45 Geo. III. c. 28, and liable to legacy duty. [*Sweeting v. Sweeting*] 331
5. A devise to trustees to the use of A. for life, with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the Court was obtained to appoint new trustees, and the heir conveyed to them. A. then conveyed his life-estate to a mortgagee, and afterwards took a reconveyance from him. Held, that A. was in *by* the devise, within the 1 Will. IV. c. 47, and an order was made for him to convey to a purchaser. [*Beale v. Tennent*] 65
6. A railway company had power "to make and maintain the railway and works on the line and upon the lands delineated in the Parliamentary plan, and described in the books of reference, and to enter upon, take, and use the said lands, or such of them as should be *necessary* for that purpose;" but they were not to enter upon, take, or use any of the land or property of a certain pre-existing railway company, or in any manner to alter, vary, or interfere with that railway, or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized, in manner in the said Act authorized, and not otherwise; one of the clauses of the Act giving certain powers to the company for effecting a junction with the pre-existing railway. Held, that there being nothing to show that it was absolutely necessary for the company, in order to effect the junction, it had no power to take as owners certain lands over which the line of the pre-existing railway actually passed; but there was a right to enter upon such lands by way of easement, for the purpose of effecting the junction. [*Oxford, Worcester, and Wolverhampton Railway Company v. South Staffordshire Railway Company*] 256

SUPPLEMENT (BILL OF).

A bill was filed by A. and his wife, alleging title in respect of the wife's estate tail. The defendant demurred for want of equity. While the demurrer was standing for argument the wife died, and A. then filed

a supplemental bill, alleging a disentailing deed before the date of the original bill, under which deed A. claimed in fee. Held, that in this state of things the demurrer could not be heard; that such an alteration of the record was not properly the subject of either supplemental bill or of original bill in the nature of a supplemental bill; or of a bill of revivor, nor properly of amendment; but the original bill ought to have been left to take its course, and a new bill filed, stating the real title. [*Wright v. Vernon*] 68

A., B., & C. in the original contract, knew of all the subsequent transactions, and acted as the solicitors of C. & F., and as such solicitors prepared many of the documents required for such transactions. The company having brought an action on the bond against the sureties, for breach of the contract, they filed this bill to restrain the action. Held, that the sureties were not discharged, and that the action could not be stopped. [*Woodcock v. Oxford and Worcester Railway Company*] 521

SUPPLEMENTAL DECREE.

The birth of one of a class, entitled as such after the institution of a suit, is within the 52nd section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree. [*Fullerton v. Martin*] 288

SURETY.

A., B., & C., contracted with a company to execute certain works on given terms. D. & E. gave a bond as their sureties for the performance of the contract. A. and B. retired from the partnership, and F. was substituted. Afterwards disputes arose between the company and C. & F. as to the conduct of the works, and various transactions took place by which the terms of the contract were varied, and during which the company paid to C. & F. certain monies which it had been agreed originally should be paid to A., B., & C.—D. & E., the sureties, were no parties to these transactions, and gave no express consent; but they had been the solicitors of

TENANT FOR LIFE.

1. A testator gave all his residuary real estate, and his stock, mortgages, and securities for money, and all other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which at the time of his death he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense. Held, first, that the widow was entitled to the leasehold in specie. Secondly, that the repairs were to be borne by the residue, and not by the tenant for life. [*Harris v. Poyner*] 174
2. A testator devises real estate, subject to a lease for a term of years at 25l. 10s. rent, to A. for life, remainder to B. A railway company purchases the interest of A. and B., subject to the lease, for 1700l.,

which is invested. The lease was granted at the said rent (less than a rack-rent) in consideration of a covenant to expend money, 600*l.*, on the estate during twenty years. Held, that the tenant for life was entitled to the whole of the dividends of the purchase-money. [*Re Steward's Estate, Ex parte Briscoe*]
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TITLE.

A. & B., trustees of a stock fund in trust for A. for life, with remainder over to unascertained persons, sold out part of the stock and lent it to B., who misapplied it. B. gave to A., by way of *security*, and *indemnifying her*, an equitable mortgage by deposit. B. then became bankrupt, and A. and B.'s assignees applied, to and obtained from the Court of Bankruptcy, on a statement of these facts, but without making the *cestuis que trust* of the fund parties, an order for sale. They sold, with a special condition referring to the petition and order in bankruptcy, that the purchaser should only have the receipt and conveyance of A. and the assignees. Held, that A. and the assignees could make a good title without the concurrence of the *cestuis que trust* in the receipt or conveyance. [*Groom v. Booth*] . . . 548

TRUST.

1. Testator by his will gave certain shares of freehold and leasehold houses to his wife, *for her sole use and benefit*, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own

family as she should think most deserving of the same. He gave her all his monies in the funds, and all the money he might be entitled to for her sole use and benefit, begging and requesting, that at her death she would give and bequeath *what should be remaining*, in such sums as she should think proper, unto such members of her own and his family that she should think most deserving, and were entitled to the same. He made a codicil, by which he gave in terms his residuary estate to his wife. Held, that both as to the freehold and leasehold property and the monies, there was no trust, but the wife took absolutely. [*Green v. Marsden*] 646

2. A renewable leasehold for lives was vested in A., in trust for B. for life, with remainders in the events that happened to C. and his heirs. Afterwards, on the marriage of B., a settlement was made (on the construction of which it was doubtful whether the leasehold passed) on B. for life, remainder to the sons of that marriage in tail, under which D. would be entitled. The lease being still subsisting in A., B. took a renewal in his own name, without noticing the trust; and after the death of B., D. entered and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under C.—D., on his marriage, assigned the leasehold to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the

construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed until all the persons who could have explained those transactions were dead: there was much ground for believing that the parties had intended the deed to include the leaseholds. Held, firstly, that assuming the possession of D., and those claiming under him, to have been originally wrongful, he and they were not express trustees within the 25th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that if even there had been an express trust, those claiming under the settlement by D. could, as purchasers, set up the statute. [*Petre v. Petre*] 371

TRUST DEED.

A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient. [*Richardson v. Jenkins*] 477

TRUSTEES.

1. Bequest to A. and B., their executors and administrators upon trust. B., the surviving trustee, by his will bequeathed his trust estates to C. and D., their heirs, executors, administrators, and assigns, on the trusts, and he appointed C., D., and E. executors of his will. Held, that C. and D. took only the legal

estate, and that neither C. and D. by themselves, nor C., D., and E., were capable of executing the trusts.

[*Re Burt*] 319

2. A trustee paying the trust money in strict accordance with the tenor of the trusts, is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts. Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life and remaindermen called for payment: Held, that the trustee might lawfully insist on a release under seal. [*King v. Mullins*] . . . 308

TRUSTEE (APPOINTMENT OF) TO CONVEY.

3. A devise to trustees to the use of A. for life, with remainders over. The trustees disclaimed. Under a mistaken idea that the trustees had the legal estate, an order of the Court was obtained to appoint new trustees, and the heir conveyed to them. A. then conveyed his life estate to a mortgagee, and afterwards took a reconveyance from him. Held, that A. was in *by* the devise, within the 1 Will. IV. c. 47, and an order was made for him to convey to a purchaser. [*Beale v. Tennent*] 65

4. A. and B., being trustees, the Master found that it was uncertain whether A. was living or dead, but B. was living; afterwards B. died. Held, that A. was not sole trustee within the Trustee Act, 1850, and the 22nd section of the Act did not apply. [*In re Randall*] . 401

USURY.

Money was lent upon bills of ex,

change at usurious interest; the lender, by way of further security, took a warrant of attorney to confess judgment, expressly stipulating that he should be at liberty to enter up judgment immediately, and he did enter up judgment within twenty-four hours. He had previously made minute inquiries as to the amount and value of the borrower's real estate. Held, that this was a security on land within the Usury Act, and the judgment could not be enforced against the proceeds of the sale of the land. [*Lane v. Horlock*] . . . 587

VENDOR AND PURCHASER.

A. and B., trustees of a stock fund in trust for A. for life, with remainder over to unascertained persons, sold out part of the stock, and lent it to B., who misapplied it. B. gave to A., by way of security, and indemnifying her, an equitable mortgage by deposit. B. then became bankrupt, and A. and B.'s assignees applied to and obtained from the Court of Bankruptcy, on a statement of these facts, but without making the *cestuis que trust* of the fund parties, an order for sale. They sold, with a special condition referring to the petition and order in bankruptcy, that the purchaser should only have the receipt and conveyance of A. and the assignees. Held, that A. and the assignees could make a good title without the concurrence of the *cestuis que trust* in the receipt or conveyance. [*Groom v. Booth*] 548

VESTING.

1. Testator devised his real estate to

trustees, with power to "let" until all his nephews and nieces should attain twenty-one. And *after* his youngest nephew or niece should be of age, *then* he directed his estates to be sold and the produce to go amongst all his nephews and nieces, except two by name. He charged his rents with an annuity to A., and with payment of bond debts, but did not otherwise dispose of them. Held, the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. [*Parke v. Sowerby*] . . . 488

2. Testator gave personal estate, outstanding on securities, to his wife for life, remainder in a moiety to six of his children; provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realized and the produce divided. Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment; and that the representatives of the deceased child took a share. [*In re Dodgson's Trust*] . . 440

WARRANT OF ATTORNEY.

1. Money was lent upon bills of exchange at usurious interest; the lender, by way of further security, took a warrant of attorney to confess judgment, expressly stipulating that he should be at liberty to enter up judgment immediately, and he did enter up judgment within twenty-four hours. He had previously made minute inquiries as to the amount and value of the borrower's

real estate. Held, that this was a security on land within the Usury Act, and the judgment could not be enforced against the proceeds of the sale of the land. [*Lane v. Horlock*] 587

2. A gift of all the residue of my estate and effects to A, B., and C., upon trust to collect, get in, and recover the same, and invest in stock, and pay the dividends, &c., to persons beneficially entitled; A. and B. being also executors. Held, to pass real estate. [*D'Almaine v. Moseley*] 629

WIFE'S EQUITY FOR A SETTLEMENT.

1. As between the husband's creditors and the wife, in respect of the wife's equity for a settlement, the Court will, under circumstances, give the wife more than one-half; and where the wife had been at the time of the marriage, and long afterwards, in circumstances of comfort, and was reduced to distress by the husband's embarrassments, the Court gave the costs of the petitioner and of the husband's assignees out of the fund, which was 681*l.*, 400*l.* to the wife and the remainder to the petitioner; the wife's costs out of her own fund. [*10 & 11 Vict. c. 96, and the Trusts of Waite's Will, Ex parte Pugh*] 202
2. A married woman has an equity for a settlement, however small the sum. Where a married woman was entitled to a fund of 153*l.*, her husband bankrupt, and unable to maintain her: Held, as between her and her husband's assignees, that the whole should be settled on her. [*In re Kincaid*] 326

WINDING-UP ACTS.

See CALLS.

1. A. was a member of the provisional committee of a projected railway company, and at a meeting thereof joined in appointing solicitors and engineers, and immediately afterwards a committee of management was appointed. A.'s name was put on this without his knowledge. He never acted in any further or other way. Expenses were incurred by the solicitors and engineer subsequently to the formation of the managing committee, and by their direction; it did not appear that any other expenses had been incurred. Held, that A. was not a contributory. [*Ex parte Hight*] 484
2. An allottee of shares in a projected railway company paid on them; he also executed the subscriber's agreement, a deed under seal; but he did so on the faith of a letter written by the provisional directors before the execution of the deed, by which they undertook to return the whole deposit if the Act should not pass. The deed was in the usual form, between all the shareholders with trustees, to perform the covenants, and contained a covenant to indemnify the provisional directors whether the Act should or should not pass. Held, that the deed, being a contract by each shareholder with all the others, its effect could not be destroyed in favour of any shareholder, by a contract between him and a certain number of shareholders; and consequently, the allottees who had signed it was not protected by the letter of the provisional directors against a call. [*Dover and Deal Railway Company, Ex parte Francis Mowatt*] 247

3. A. was an allottee of shares in a projected railway company, which failed to obtain an Act, and was never completed. He paid his deposit, but never executed any deed. Accompanying the letter of allotment, was a circular from the directors, undertaking to return the deposits if an Act should not be obtained. Afterwards A., at the request of the directors, asking for the continuance of the confidence of the shareholders, wrote to the board, requesting them to continue the undertaking. On the breaking up of the company, the directors returned the balance of the deposits remaining in their hands, and paid to A. on that account 200*l*. A. recovered in an action against one of the managing directors the remaining 220*l*. Held, that A. was not a contributory. [*Re Dover and Deal Railway Company, Ex parte Beardshaw*] 226
4. A. became a member of the provisional committee of a projected company, which was never completed. He signed the agreement required by the Registration Act; he applied for 100 shares, undertaking to accept them if allotted; instead of 100 shares being allotted to him, he, in common with other committee-men, was requested to take up twenty-five; he did not take them up. He was called upon then to pay two successive payments, making together 105*l*., on which he was assured he should be protected from the claims of creditors; he did, in consequence, pay 105*l*. Held, that A. was not a contributory. [*In the Matter of the Winding-up Acts, 1848 and 1849, and of the Wolverhampton, Chester, and Birkenhead Junction Railway Company, Ex parte Roberts*] 204
5. A winding-up order is not to be made of course, because a company is within one of the eight classes described in the 5th section of the Act, but it is for the Court to judge of the necessity or expediency. And where a company was insolvent, but there was an arrangement pending by which the admitted debts would be cleared by a subscription among the shareholders, and there were no other questions except equities between the shareholders, the Court refused a winding-up order on the petition of a few shareholders holding very few shares. [*Ex parte Wise*] 465

WILL.

1. Testator devised his real estate to trustees, with powers to "let" until all his nephews and nieces should attain twenty-one. And *after* his youngest nephew or niece should be of age, *then* he directed his estates to be sold, and the produce to go amongst all his nephews and nieces, except two by name. He charged his rents with an annuity to A. and with payment of bond debts, but did not otherwise dispose of them. Held, first, the widow was put to her election; secondly, the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. [*Parker v. Sowerby*] . . . 488
2. A testator seised of real estate, and leasehold and personal estate, and, among other property, of leasehold collieries or mines, gave certain real estates to his son; he devised and bequeathed all his other real and personal estate upon trust, *with the approbation of his son*, at some convenient and proper period

to sell and convert the same, and to invest and apply 1000*l.* part thereof, for his granddaughter; and after giving some small annuities in trust to pay to his daughter 200*l.* a-year, besides one-half share of the yearly income and produce of his real and personal estates, his intention being, that she should enjoy an equal yearly income with his son during her natural life, treating 200*l.* a-year as equivalent to the real estate given to his son, provided that his daughter's annuity should in no case exceed 600*l.* a-year; and that the over-plus, after 600*l.* a-year to her, and 400*l.* to his son, should go to his son, but that what he called produce of his personal estate was not to be taken as the income derived from the mines, but the profit arising, after laying by 10*l.* per cent. to pay back the capital expended in plant, &c.; and subject to these gifts and devises, he gave all his real and personal estate to his son: the son was appointed, with the trustees, executor; they disclaimed and renounced, and he entered into sole possession. In taking the accounts of the testator's estate, Held, that the son had a right to apply in payment of debts all permanent personal property before disposing of the mines. That, having paid off with his own monies debts which could not have been paid off without resorting to the mines, the debts so kept alive in his hands were a charge on the net produce of the mines. That the accumulations of the 10*l.* per cent. were a fund liable to the debts in exoneration of the mines. That, as to any liabilities due to him in respect of over-payments of debts made by him beyond the assets applicable, he would be en-

titled to interest. That the 1000*l.* legacy to the grand-daughter was a charge on the real and personal estate, *pro ratâ*. [*Lord v. Wightwick*] 576

3. A gift of all the residue of my estate and effects to A., B., and C., upon trust to collect, get in, and recover the same, and invest in stock, and pay the dividends, &c., to persons beneficially entitled, A. and B. being also executors: Held to pass real estate. [*D'Almaine v. Moseley*] 629
4. Testator set out a schedule of his property, calling it 5000*l.* He then directed 1000*l.* to be invested in each child's name, and 1000*l.* in his wife's; interest to them for their life, and afterwards to their *descendants*, except his wife's, which was at his death to be sold and divided among them, except 200*l.* to M. L.'s child by him. Then followed in the same paper: "The above is increased by the working up of stock to 5500*l.* I wish the same division and appropriation, except that if any share falls in, it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters. Held, that by the will alone the daughters would have taken absolute interests, but that by the will and codicil together they took interests which, if absolute in the first instance were defeasible. [*Bird v. Webster*] 338
5. Bequest to A. and B., their executors and administrators, upon trust. B., the surviving trustee, by his will bequeathed his trust estates to C. and D., their heirs, executors, administrators, and assigns, on the trusts, and he appointed C., D., and E. executors of his will. Held, that C. and D. took only the legal

- estate, and that neither C. and D. by themselves, nor C., D., and E., were capable of executing the trusts [*Re Burt*] 319
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7. A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees *specially named*, except one of the classes described. Held, that this showed, that by the words *specially named*, the testator meant *described or mentioned*, and that all the legatees, whether *named* or only *described*, took shares. [*In re Holmes*] 321
8. Testator gave his residue to his wife for life, and after her decease one-seventh of it to each of six of his children; he gave the other seventh to be laid out in government annuities for his son A. for life, to be paid into his hands from time to time without power of anticipation, with a limitation over in the event of his being bankrupt, insolvent, &c., in the lifetime of the testator or after his death. A. died in the lifetime of the tenant for life, not having been bankrupt, &c. Held, that his representatives were entitled to one-seventh of the residue. [*Day v. Day*] 569
9. A testator gave to his wife certain chattels and leaseholds, and certain pecuniary benefits. He gave all his freehold messuages, lands, tenements, and hereditaments, and all the rest and residue of his leasehold messuages or tenements and premises whatsoever and wheresoever, to trustees for all his estate and interest therein respectively, upon trust to sell his freehold and leasehold messuages or tenements, hereditaments, and premises, &c., and to stand possessed of the monies to accrue from such sale, upon certain trusts. He directed that, until sale, the rents and profits should be applied in the same manner as he directed as to the income of the monies to arise from the sale. He gave the produce of the sale of his freehold, copyhold, and leasehold estate, and of his residuary personalty, as to one-fourth to his wife, as to one-fourth to one of his sisters for life, remainder to other relations, one-fourth to another sister, remainders over, and one-fourth to other persons. Before his will, he had sold some of his freehold estate, and his wife

had joined to bar dower. Both before and after his will, he had contracted to lease parts of his freehold estate; after his will, he had contracted to sell one of these parts to the lessee; and after his will, he agreed to let some part of his freeholds, with liberty to the lessee to pull down buildings and erect others. After his death, the lessee of the last-mentioned premises did pull down the buildings and erect others, thereby improving the value of the estate. Held, first, that the widow was not put to her election, but was entitled to her dower, as well as to the benefits given to her by the will. Secondly, that the acts by which the value of the property was increased not being hers, she would take her dower according to the existing value.

[*Gibson v. Gibson*] . . . 42

10. A testator gave all his residuary real estate and his stock, mortgages, and securities for money, and all other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which, at the time of his death, he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense. Held, first, that the widow was entitled to the leaseholds in specie. Secondly, that the repairs were to be borne by the residue, and not by the tenant for life. [*Harris v. Poyner*] . . . 174

11. A marriage settlement comprised a sum of 20,000*l.* South Sea An-

nuities; 7000. 3*l.* per Cent. Reduced; and 3150 New 4*l.* per Cents; also certain shares in a company; and 54,000 French Rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife for her separate use, subject thereto for the husband and wife for their joint lives; if the wife should pre-decease her husband, then on trust to raise 3000*l.*, over which a general power of appointment was given to the wife; and as to the rest, after the death of the wife so pre-deceasing her husband, for him for life, and after his death in trust for all and every or such one or more exclusively of the other or others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money and future or executory or other trusts (such annual sums of money and future or executory or other trusts being for the benefit of the said relations in blood of the said Sarah Harvey within the degree aforesaid, or some or one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by two or more credible witnesses, direct or appoint; and in default of such direction or appointment and so far as any such direction or appoint-

ment should not extend, in trust for such person or persons as, under the statute for the Distribution of the Effects of Intestates, would, at the decease of the said Sarah Harvey, have become entitled thereto as her next of kin in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof his widow, and intestate. The settlement also comprised certain plate, linen, china, &c., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, &c.; and as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said:—"I do, by virtue of the power and authority reserved to me in and by the deed of settlement, made, &c., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows:—"And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the

trusts thereof into execution, I direct and appoint, give, and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security during the respective lives of my said nieces; and the dividends or interest on each share, as the same shall from time to time become due shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at

the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead equally, share and share alike ; but the issue of any deceased niece is only to be entitled to the share which ~~his~~ or their mother would have had if living at the decease of the said Caroline Onley ; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relations in blood to my said niece, in such parts and proportions, manner and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same ; and, in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates." Held, first, that the will was an execution of all the powers ; that is, of the power to appoint each portion of property comprised in the settlement. Secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio*, because it might comprise persons not living at the death of the testatrix and within the eighth degree ; nor did it become void *in toto*, because it did in fact, at the time of distribution, include such persons ; but that it was good *pro tanto*. Thirdly, that the attempted limita-

tion to the husbands of the nieces was bad, as they were strangers ; and the limitations to their children, grandchildren, or other relations in blood, was void for remoteness. Fourthly, that the attempt to cut down the estate given to the nieces in the first instance, failing, the attempted remainders over did not go as unappointed, to the next of kin, but failed wholly, and left absolute interests subsisting in the nieces. [*Harvey v. Stracey*]

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12. Testator by his will gave certain shares of freehold and leasehold houses to his wife, *for her sole use and benefit*, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He gave her all his monies in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath *what should be remaining*, in such sums as she should think proper, unto such members of her own and his family that she should think most deserving, and were entitled to the same. He made a codicil by which he gave in terms his residuary estate to his wife. Held, that both as to the freehold and leasehold property and the monies there was no trust, but the wife took absolutely. [*Green v. Marsden*] 647

13. A gift by will to a particular charitable institution maintained voluntarily by private means. The particular institution had ceased. Held, that the gift was not to be disposed of as a charitable gift

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- cy près*, but failed and fell into the residue. [*Clark v. Taylor*] . . . 642
14. Testator gave property to his trustees, upon trust to pay, distribute, and divide equally between his daughters, naming them, to be paid and assured to them as they should attain the age of twenty-one, or be married under that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same. There was a power of maintenance, and gifts over as between the daughters on dying unmarried under twenty-one, and if all the daughters should die under twenty-one unmarried, and without leaving issue, then over. Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent. [*Taylor v. Austen*] . . . 459
15. Testator gave personal estate outstanding on securities to his wife for life, remainder in a moiety to six of his children: provided that if any one died before receiving his or her share without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realized and the produce divided. Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment, and that the representatives of the deceased child took a share. [*In re Dodgson's Trust*] . . . 440
16. Testator gave Long Annuities to A. for life, and if she died without leaving issue her surviving, then to B. and C., to be paid to them at twenty-one, if both living; but if either should be then dead, then to the survivor. B. and C. both attained twenty-one, but died in the lifetime of A., who died without issue. Held, that the word *then* had reference to the death of A. without issue, and that the residuary legatee and not the representatives of B. and C., took. [*Widdicombe v. Muller*] . . . 443
17. Devise to A. for life, remainder to all and every the children of her body, their heirs and assigns, as tenants in common; but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her; one died leaving a child who survived A.; the other died without issue. Held, that the word *leaving* meant *having*, and that the two children of A. took vested interests as tenants in common in fee. [*Ex parte Hooper*] . . . 264
18. A. made his will and gave personalty to B., a married woman, for life, and after her death as she should appoint, and in default of appointment, to her husband; and if she should survive him and make no appointment, then to her children. B. had three children, and by her will she appointed, after her husband's death, 2000*l.* between two of her children, and 1500*l.* to the other, and she appointed the residue to her three children by name in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children, (—)*l.* to another, and the residue to the third. Held, that the husband had no power to exclude either of the children; that his appointment was therefore bad; and that the appointment of the

wife took effect in favour of the three children. [*White v. Wilson*] 298

tage in applying to the new practice, it ought, according to the intention of the Act, to be applied. [*Howard v. Howard*] . . . 239

WITNESSES (EXAMINATION OF).

In a cause at issue before the Orders of 7th August, 1852, agreed to postpone publication till the 2nd November, on the ground that the new practice would then come into operation. The case was one in which it was not clear, but probable, that oral examination might be the most effective. Held, that the postponement of publication was not an agreement to adopt the new practice; but, in the absence of special reasons to the contrary, there being a *probability* of advan-

WORDS.

1. A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees *especially named*, except one of the classes described. Held, that this showed that by the words *especially named* the testator meant *described or mentioned*, and that all the legatees, whether *named* or only *described*, took shares. [*In re Holmes*] 321

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3. A. was an allottee of shares in a projected railway company, which failed to obtain an Act, and was never completed. He paid his deposit, but never executed any deed. Accompanying the letter of allotment, was a circular from the directors, undertaking to return the deposits if an Act should not be obtained. Afterwards A., at the request of the directors, asking for the continuance of the confidence of the shareholders, wrote to the board, requesting them to continue the undertaking. On the breaking up of the company, the directors returned the balance of the deposits remaining in their hands, and paid to A. on that account 200*l*. A. recovered in an action against one of the managing directors the remaining 220*l*. Held, that A. was not a contributory. [*Re Dover and Deal Railway Company, Ex parte Beardshaw*] 226
4. A. became a member of the provisional committee of a projected company, which was never completed. He signed the agreement required by the Registration Act; he applied for 100 shares, undertaking to accept them if allotted; instead of 100 shares being allotted to him, he, in common with other committee-men, was requested to take up twenty-five; he did not take them up. He was called upon then to pay two successive payments, making together 105*l*., on which he was assured he should be protected from the claims of creditors; he did, in consequence, pay 105*l*. Held, that A. was not a contributory. [*In the Matter of the Winding-up Acts, 1848 and 1849, and of the Wolverhampton, Chester, and Birkenhead Junction Railway Company, Ex parte Roberts*] 204
5. A winding-up order is not to be made of course, because a company is within one of the eight classes described in the 5th section of the Act, but it is for the Court to judge of the necessity or expediency. And where a company was insolvent, but there was an arrangement pending by which the admitted debts would be cleared by a subscription among the shareholders, and there were no other questions except equities between the shareholders, the Court refused a winding-up order on the petition of a few shareholders holding very few shares. [*Ex parte Wise*] 465

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- had joined to bar dower. Both before and after his will, he had contracted to lease parts of his freehold estate; after his will, he had contracted to sell one of these parts to the lessee; and after his will, he agreed to let some part of his freeholds, with liberty to the lessee to pull down buildings and erect others. After his death, the lessee of the last-mentioned premises did pull down the buildings and erect others, thereby improving the value of the estate. Held, first, that the widow was not put to her election, but was entitled to her dower, as well as to the benefits given to her by the will. Secondly, that the acts by which the value of the property was increased not being hers, she would take her dower according to the existing value. [*Gibson v. Gibson*] . . . 42
10. A testator gave all his residuary real estate and his stock, mortgages, and securities for money, and all other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which, at the time of his death, he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense. Held, first, that the widow was entitled to the leaseholds in specie. Secondly, that the repairs were to be borne by the residue, and not by the tenant for life. [*Harris v. Poyner*] . . . 174
11. A marriage settlement comprised a sum of 20,000*l.* South Sea Annuities; 7000*l.* 3*l.* per Cent. Reduced; and 3150 New 4*l.* per Cents; also certain shares in a company; and 54,000 French Rentes. These were settled on trust to raise an annuity of 500*l.* for the life of the wife for her separate use, subject thereto for the husband and wife for their joint lives; if the wife should pre-decease her husband, then on trust to raise 3000*l.*, over which a general power of appointment was given to the wife; and as to the rest, after the death of the wife so pre-deceasing her husband, for him for life, and after his death in trust for all and every or such one or more exclusively of the other or others of the relations in blood to the said Sarah Harvey (the wife) at the time of her decease within the eighth degree of consanguinity to her, at such age, day, or time, or respective ages, days, or times, and, if more than one, in such shares and proportions, and with such annual sums of money and future or executory or other trusts (such annual sums of money and future or executory or other trusts being for the benefit of the said relations in blood of the said Sarah Harvey within the degree aforesaid, or some or one of them), and in such manner as the said Sarah Harvey should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by two or more credible witnesses, direct or appoint; and in default of such direction or appointment and so far as any such direction or appoint-

ment should not extend, in trust for such person or persons as, under the statute for the Distribution of the Effects of Intestates, would, at the decease of the said Sarah Harvey, have become entitled thereto as her next of kin in case the said Archibald Morrison (the husband) had died in her lifetime, and she had died possessed thereof his widow, and intestate. The settlement also comprised certain plate, linen, china, &c., over which a general power of appointment was given to the wife, to take effect after the death of the husband. It comprised also certain shares in a public library, and tickets of admission to a theatre, and jewellery, &c.; and as to these, the settlement gave to the wife a general power of gift and appointment, either during her life or after her death, as well as over what she should save out of her separate income. The wife died many years before her husband. By her will she said:—"I do, by virtue of the power and authority reserved to me in and by the deed of settlement, made, &c., hereby make, publish, and declare this my last will and testament in manner and form following, that is to say." She then referred particularly to the power to dispose of 3000*l.*, and made a disposition of a great part of it. She gave to her husband for life all the benefit of her shares in the public library, of her admission to the theatre, and of her books. After his death she disposed of these things to various persons; she disposed also of her jewels, china, and other things; and her will concluded as follows:—"And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the

trusts thereof into execution, I direct and appoint, give, and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savile Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further, it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on government or real security during the respective lives of my said nieces; and the dividends or interest on each share, as the same shall from time to time become due shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley, I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at

the decease of the said Caroline Onley, and to the issue of such of them as shall then happen to be dead equally, share and share alike ; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley ; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relations in blood to my said niece, in such parts and proportions, manner and form, as she may by her last will and testament, duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same ; and, in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates." Held, first, that the will was an execution of all the powers ; that is, of the power to appoint each portion of property comprised in the settlement. Secondly, that the appointment in favour of the daughters of John Harvey was not void *ab initio*, because it might comprise persons not living at the death of the testatrix and within the eighth degree ; nor did it become void in *toto*, because it did in fact, at the time of distribution, include such persons ; but that it was good *pro tanto*. Thirdly, that the attempted limita-

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tion to the husbands of the nieces was bad, as they were strangers ; and the limitations to their children, grandchildren, or other relations in blood, was void for remoteness. Fourthly, that the attempt to cut down the estate given to the nieces in the first instance, failing, the attempted remainders over did not go as unappointed, to the next of kin, but failed wholly, and left absolute interests subsisting in the nieces. [*Harvey v. Stracey*]

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12. Testator by his will gave certain shares of freehold and leasehold houses to his wife, *for her sole use and benefit*, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He gave her all his monies in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath *what should be remaining*, in such sums as she should think proper, unto such members of her own and his family that she should think most deserving, and were entitled to the same. He made a codicil by which he gave in terms his residuary estate to his wife. Held, that both as to the freehold and leasehold property and the monies there was no trust, but the wife took absolutely. [*Green v. Marsden*] 647

13. A gift by will to a particular charitable institution maintained voluntarily by private means. The particular institution had ceased. Held, that the gift was not to be disposed of as a charitable gift

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- cy près*, but failed and fell into the residue. [*Clark v. Taylor*] . . . 642
14. Testator gave property to his trustees, upon trust to pay, distribute, and divide equally between his daughters, naming them, to be paid and assured to them as they should attain the age of twenty-one, or be married under that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same. There was a power of maintenance, and gifts over as between the daughters on dying unmarried under twenty-one, and if all the daughters should die under twenty-one unmarried, and without leaving issue, then over. Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent. [*Taylor v. Austen*] . . . 459
15. Testator gave personal estate outstanding on securities to his wife for life, remainder in a moiety to six of his children: provided that if any one died before receiving his or her share without leaving lawful issue, it should go over. One of the children died after the wife's death, before the securities were realized and the produce divided. Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment, and that the representatives of the deceased child took a share. [*In re Dodgson's Trust*] . . . 440
16. Testator gave Long Annuities to A. for life, and if she died without leaving issue her surviving, then to B. and C., to be paid to them at twenty-one, if both living; but if either should be then dead, then to the survivor. B. and C. both attained twenty-one, but died in the lifetime of A., who died without issue. Held, that the word *then* had reference to the death of A. without issue, and that the residuary legatee and not the representatives of B. and C., took. [*Widdicombe v. Muller*] . . . 443
17. Devise to A. for life, remainder to all and every the children of her body, their heirs and assigns, as tenants in common; but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her; one died leaving a child who survived A.; the other died without issue. Held, that the word *leaving* meant *having*, and that the two children of A. took vested interests as tenants in common in fee. [*Ex parte Hooper*] . . . 264
18. A. made his will and gave personalty to B., a married woman, for life, and after her death as she should appoint, and in default of appointment, to her husband; and if she should survive him and make no appointment, then to her children. B. had three children, and by her will she appointed, after her husband's death, 2000*l.* between two of her children, and 1500*l.* to the other, and she appointed the residue to her three children by name in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children, (—)*l.* to another, and the residue to the third. Held, that the husband had no power to exclude either of the children; that his appointment was therefore bad; and that the appointment of the

wife took effect in favour of the three children. [*White v. Wilson*] 298

tage in applying to the new practice, it ought, according to the intention of the Act, to be applied. [*Howard v. Howard*] . . . 239

WITNESSES (EXAMINATION OF).

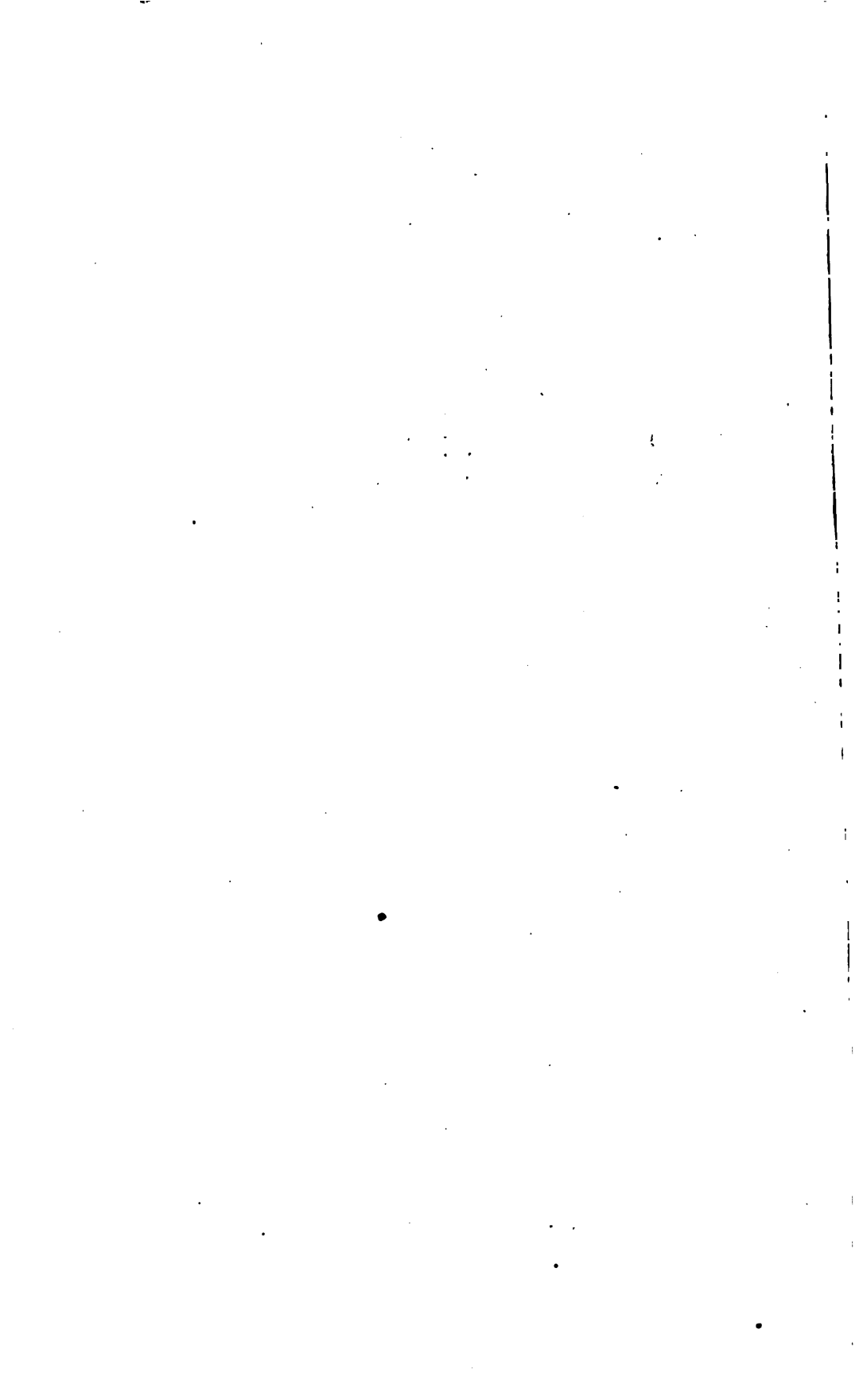
In a cause at issue before the Orders of 7th August, 1852, agreed to postpone publication till the 2nd November, on the ground that the new practice would then come into operation. The case was one in which it was not clear, but probable, that oral examination might be the most effective. Held, that the postponement of publication was not an agreement to adopt the new practice; but, in the absence of special reasons to the contrary, there being a *probability* of advan-

WORDS.

1. A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees *specially named*, except one of the classes described. Held, that this showed that by the words *specially named* the testator meant *described or mentioned*, and that all the legatees, whether *named* or only *described*, took shares. [*In re Holmes*] 321

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